DOCKET

No. 07-455
Title: United States, Petitioner
v.
Ahmed Ressam
Docketed: October 4, 2007
Lower Ct: United States Court of Appeals for the Ninth Circuit
Case Nos.: (05-30422, 05-30441)
Decision Date: January 16, 2007
Rehearing Denied: June 6, 2007
Questions Presented

~~Date~~~	~~~~~~~~Proceedings and Orders~~~~~~~~~~~~~~~~~~~~~~~~
Aug 21 2007	Application (07A144) to extend the time to file a petition for a writ of certiorari from September 4, 2007 to October 4, 2007, submitted to Justice Kennedy.
Aug 22 2007	Application (07A144) granted by Justice Kennedy extending the time to file until October 4, 2007.
Oct 4 2007	Petition for a writ of certiorari filed. (Response due November 5, 2007)
Nov 5 2007	Brief of respondent Ahmed Ressam in opposition filed.
Nov 20 2007	DISTRIBUTED for Conference of December 7, 2007.
Nov 20 2007	Reply of petitioner United States filed. (Distributed)
Dec 7 2007	Petition GRANTED.
Jan 22 2008	SET FOR ARGUMENT ON Tuesday, March 25, 2008.
Jan 22 2008	Brief of petitioner United States filed.
Jan 22 2008	Joint appendix filed.
Feb 1 2008	Record received from U.S.C.A. for the 9th Circuit. (1 envelope)
Feb 4 2008	U.S.D.C. for the Western District of Washington record received from the Chambers of Judge Pamela A. Rymer of the U.S.C.A. for the Ninth Circuit. (2 boxes)
Feb 5 2008	CIRCULATED.
Feb 21 2008	Brief of respondent Ahmed Ressam filed. (Distributed)
Feb 27 2008	Brief amicus curiae of National Association of Criminal Defense Lawyers filed. (Distributed)
Mar 18 2008	Reply of petitioner United States filed. (Distributed)
Mar 25 2008	Argued. For petitioner: Michael B. Mukasey, Attorney General, Department of Justice, Washington, D.C. For respondent: Thomas W. Hillier, II, Federal Public Defender, Seattle, Wash.

PETITION FOR WRIT OF CERTIORARI

Supreme Court, U.S.
FILED
07-455 OCT 4 - 2007
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." The question presented is whether Section 844(h)(2) requires that the explosives be carried "in relation to" the underlying felony.

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In the Supreme Court of the United States

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UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Solicitor General, on behalf of the United States of America, respectfully petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Ninth Circuit in this case.

OPINION BELOW

The opinion of the court of appeals (App., *infra*, 1a-23a) is reported at 474 F.3d 597.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2007. A petition for rehearing was denied on June 6, 2007 (App., *infra*, 24a-31a). On August 22, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 4, 2007. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to this petition. App., *infra*, 32a-36a.

STATEMENT

Respondent was indicted on nine counts growing out of his attempt to enter the United States with an explosive, intending to detonate the explosive at Los Angeles International Airport (LAX). Following a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of conspiring to commit an act of terrorism transcending a national boundary, in violation of 18 U.S.C. 2332b(a)(1)(B) (Count 1); placing explosives in proximity to a terminal, in violation of 18 U.S.C. 33 (Count 2); possessing false identification documents with intent to defraud the United States, in violation of 18 U.S.C. 1028(a)(4) (Count 3); entering the United States using a fictitious name, in violation of 18 U.S.C. 1546 (Count 4); making a false statement to a United States customs official, in violation of 18 U.S.C. 1001 (Count 5); smuggling explosives into the United States, in violation of 18 U.S.C. 545; transporting explosives without a permit, in violation of 18 U.S.C. 842(a)(3)(A) (Count 7); possessing an unregistered destructive device, in violation of 26 U.S.C. 5845(a), 5861(d) (Count 8); and carrying explosives during the commission of a felony (the false statement offense charged in Count 5), in violation of 18 U.S.C. 844(h)(2) (Count 9). He was sentenced to 22 years of imprisonment. A divided panel of the court of appeals reversed respondent's conviction on the Section 844(h)(2) count, holding that the government had been required to establish that the explosives were carried

"in relation to" the underlying false statement offense charged in Count 5. App., *infra*, 1a-23a.

1. Section 844(h) prescribes a mandatory ten-year term of imprisonment for any person who

> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States.

18 U.S.C. 844(h). The statute further states that a district court "shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment * * * run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried." *Ibid.*

2. Respondent is an Algerian citizen. In 1998, he was recruited by an al Qaeda operative while living in Canada. After using a forged baptismal certificate to obtain a Canadian passport in the name Benni Antoine Noris, respondent traveled to Afghanistan, where he received advanced training in the manufacture and use of explosives. During that period, respondent and others conceived a plot to target a U.S. airport to coincide with the millennium. App., *infra*, 4a; C.A. E.R. 496. Respondent eventually selected LAX as his target. App., *infra*, 1a, 4a.

On December 14, 1999, respondent and another al Qaeda operative loaded explosives, electronic timing devices, detonators, fertilizer, and aluminum sulfite into the spare tire compartment of a rental car. Respondent then traveled to the United States by a circuitous route,

ultimately boarding the day's last car ferry from Tswassen, British Columbia to Port Angeles, Washington. App., *infra*, 4a.

Upon arrival in the United States, respondent became agitated when questioned by a customs inspector. The customs inspector instructed respondent to complete a customs declaration form, on which respondent claimed to be a Canadian citizen and signed his name as Benni Noris. App., *infra*, 5a; C.A. E.R. 630-631. The customs inspector directed respondent to a secondary inspection station, where respondent's vehicle was searched and the explosives and other items were discovered. An expert later determined that a bomb made from the materials found in respondent's car could have killed or injured hundreds of people if detonated during the holiday travel rush at LAX. App., *infra*, 5a.

3. On February 14, 2001, a grand jury returned a nine-count Second Superseding Indictment. App., *infra*, 5a. Count 9 charged a violation of 18 U.S.C. 844(h)(2). It read:

> On or about December 14, 1999, * * * [respondent] knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is making a false statement to a U.S. Customs Inspector as charged in Count 5.

App., *infra*, 14a.

At trial, respondent filed a motion for a judgment of acquittal on Count 9, arguing that the act of carrying explosives had played no role in the false statement offense charged in Count 5. The district court denied that motion. Respondent also unsuccessfully objected to the district court's jury instructions on Count 9 because

they did not contain a relational requirement. The jury found respondent guilty on all counts. App., *infra*, 6a.

Shortly after the jury's verdict, respondent entered into a cooperation agreement with the government. Respondent provided extensive assistance, but later "stopped cooperating." App., *infra*, 6a. "[A]t the court's instigation" and in the hope of encouraging additional cooperation, the government moved under Guidelines § 5K1.1 for a downward departure based on respondent's testimony at one trial. *Ibid.*; C.A. E.R. 100. "Still, [respondent] did not resume cooperation." App., *infra*, 6a. As a result, the government was forced to dismiss pending indictments against two confederates who had been charged based on information provided by respondent. Gov't C.A. E.R. 116-142.

As calculated by the probation officer, respondent's convictions carried a Guidelines range of 65 years to life imprisonment. C.A. E.R. Under Seal 296. The district court sentenced respondent to 22 years of imprisonment and instructed the government "to allocate that [term of imprisonment] according to the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years." App., *infra*, 6a-7a. The district court "expressed no view on an appropriate Guidelines range, including the effect of the factors bearing on substantial assistance to authorities in § 5K1.1, and offered no explanation for imposition of the particular sentence in consideration of the factors in 18 U.S.C. § 3553(a)." *Id.* at 7a.

4. The government appealed the sentence as unreasonable, and respondent filed a cross-appeal challenging the sufficiency of the evidence on Count 9. A divided panel of the court of appeals reversed respondent's conviction on Count 9 and remanded for resentencing with-

out reaching the government's arguments. App., *infra*, 1a-23a.

a. The court of appeals acknowledged that "the Third and Fifth Circuits have declined to interpret § 844(h)(2) as requiring that the explosives be carried in relation to the underlying felony." App., *infra*, 7a (citing *United States* v. *Rosenberg*, 806 F.2d 1169, 1179 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987), and *United States* v. *Ivy*, 929 F.2d 147, 151 (5th Cir.), cert. denied, 502 U.S. 883 (1991)). But it held that its earlier decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) (Kennedy, J.), mandated a different result. App., *infra*, 8a-12a. *Stewart* involved 18 U.S.C. 924(c), which at the time of the defendant's conduct in that case had proscribed "carr[ying] a firearm unlawfully during the commission of any felony." 18 U.S.C. 924(c)(2) (1982). Shortly before the Ninth Circuit's decision in *Stewart*, Congress amended Section 924(c) by deleting the word "unlawfully" and adding "and in relation to" after "during." See Act of Oct. 12, 1984, Pub. L. No. 98-473, § 1005, 98 Stat. 2138. The legislative history of that amendment, *Stewart* concluded, "reveal[ed] an understanding on the part of the amending Congress that the earlier Congress intended to require a relation between the firearm and the underlying crime." 779 F.2d at 540. Based on that subsequent history, as well as the "sparse" legislative history of the original statute, *Stewart* interpreted the pre-amended Section 924(c)(2) "as if it contained the requirement that the firearm be possessed 'during and in relation to' the underlying offense." *Ibid.*

Here, the court of appeals reasoned that *Stewart*'s construction of former Section 924(c)(2) mandated the conclusion that "§ 844(h)(2) necessarily always had a

relational element as well." App., *infra*, 11a. Section 844(h), it emphasized, had been patterned after Section 924(c), and the original version of the explosives statute "was identical to the original firearms counterpart that we considered in *Stewart*." *Id.* at 9a-10a. The court of appeals acknowledged that Congress had, post-*Stewart*, amended Section 844(h)(2) by striking the word "unlawfully" without at the same time adding "and in relation to." *Id.* at 10a-11a. But the court of appeals stated that the legislative history of that amendment "does not specifically say why" Section 844(h)(2) was amended in that manner, and it reasoned that "[b]ecause in *Stewart* we did not think addition of the phrase 'and in relation to' changed the scope of original § 924(c), we are hard-pressed now to say that its absence changes the scope of § 844(h)(2)." *Id.* at 11a.

Having interpreted Section 844(h)(2) as including an implicit relational element, the court of appeals stated that there was "no real dispute that [respondent's] conviction on Count 9 cannot stand." App., *infra*, 12a. Although respondent had conceded that the government introduced "ample evidence" that he made a false statement on his customs form and that "he carried explosives in the trunk of his car," the court stated that there was "no evidence" that the explosives "facilitated" or "aided the commission of" the underlying false statement offense. *Id.* at 12a-13a.

b. Judge Alarcón dissented from the court of appeals' decision to reverse respondent's conviction on Count 9. App., *infra*, 14a-23a. In his view, the statutory text plainly and unambiguously demonstrates that Section 844(h)(2) contains no relational requirement, and the court "lack[ed] the constitutional authority to add an element to a criminal statute." *Id.* at 19a. Judge

Alarcón also observed that "Congress has not amended § 844(h)(2) to add a relational element" in response to the Third Circuit's twenty-year-old holding in *Rosenberg*, *id.* at 20a, and he argued that *Stewart* did not limit the court's ability to follow "the words expressly and unambiguously set forth by Congress in a separate statute," *id.* at 21a.

5. The court of appeals denied the government's petition for rehearing en banc. App., *infra*, 24a-25a. Judge O'Scannlain filed a dissent from the denial of rehearing that was joined by Judges Kleinfeld, Gould, Bybee, Callahan, and Bea. *Id.* at 25a-31a. Congress's failure to add the words "and in relation to" when it amended the explosives statute in 1988, Judge O'Scannlain argued, meant that the court was "not 'constrained' by *Stewart*'s reasoning in deciding the proper interpretation of § 844(h)(2)." *Id.* at 28a. He also explained that the panel's decision was "in conflict with every other circuit which has had occasion to consider the question." *Id.* at 29a (citing *Rosenberg*, *supra*; *Ivy*, *supra*; and *United States* v. *Jenkins*, 229 Fed. Appx. 362 (6th Cir. 2005), cert. denied, 126 S. Ct. 2022 (2006)). Finally, Judge O'Scannlain stated that it was "reasonable to question the validity of *Stewart*'s reasoning," because that decision had relied "upon the legislative history of an amendment to determine the scope of the pre-amendment statute" and because "other courts have not read the legislative history relied upon by *Stewart* to be so clear." *Id.* at 30a n.3 (citing *Rosenberg*, 806 F.2d at 1178).

REASONS FOR GRANTING THE PETITION

The court of appeals has misconstrued 18 U.S.C. 844(h)(2) in a way that conflicts with the decisions of other courts of appeals and could significantly diminish the statute's usefulness as a tool for combating terrorism-related offenses. Nothing in the text of Section 844(h)(2) indicates that the explosives must have been carried "in relation to" the underlying felony, and this Court has repeatedly emphasized that courts should not "read * * * absent word[s] into [a] statute." *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004). That conclusion is bolstered by Congress's express inclusion of the very words the Ninth Circuit read into Section 844(h)(2), "in relation to," in the current version of Section 924(c), whose predecessor provided the model for Section 844(h)(2). The contrast between the two statutes confirms that the absence of comparable language in Section 844(h)(2) reflects a deliberate choice.

The court of appeals' erroneous holding warrants review. The panel majority acknowledged a square conflict between its decision here and the decisions of two other courts of appeals, App., *infra*, 7a-9a, and it stated that the proper resolution of that conflict "matters in this case," *id.* at 7a. Section 844(h)(2) applies to respondent's conduct, if no relational element must be established, because he clearly carried an explosive during his felony of making a false statement to a customs inspector. But under the court of appeals' holding, it does not, even though his possession of an explosive raised a significant danger to others. The proper scope of Section 844(h)(2) is a matter of increasing importance in light of the provision's application to certain terrorist plots. Indeed, this case provides an apt illustration of why the

court of appeals' holding will make it more difficult to obtain appropriate punishment in situations where the government foils an act of terrorism before the plan is put into action. Accordingly, this Court's review is warranted.

A. The Decision Of The Court Of Appeals Conflicts With Decisions Of Other Courts Of Appeals

Section 844(h)(2) provides a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). The court of appeals held that this provision requires proof that the explosives were carried "in relation to" the specified felony, App., *infra*, 2a, 11a, and it reversed respondent's conviction on Count 9 because it concluded that no such relationship had been established in this case, *id.* at 12a-13a. As the panel majority acknowledged, *id.* at 7a-9a, that decision directly conflicts with the published decisions of two other courts of appeals.

1. In *United States* v. *Rosenberg*, 806 F.2d 1169 (1986), cert. denied, 481 U.S. 1070 (1987), the Third Circuit squarely held that Section "844(h)(2) has no relational element," *id.* at 1179, and it affirmed a conviction under that provision even though "no specific connection was shown between the carrying of the explosives and the [underlying] felony," *id.* at 1177.

The version of Section 844(h)(2) in effect at the time of *Rosenberg* was identical to the current statute except for its inclusion of the word "unlawfully" between "explosive" and "during." See 18 U.S.C. 844(h)(2) (1982) (mandating enhanced punishment for any person who "carries an explosive unlawfully during the commission

of any felony which may be prosecuted in a court of the United States"). Because no colorable argument exists that Congress's elimination of the word "unlawfully" somehow added a relational element mentioned nowhere in the text of either version of Section 844(h)(2), the conflict between the court of appeals' decision here and *Rosenberg* is a square one. See App., *infra*, 7a-9a (acknowledging conflict with *Rosenberg*); *id.* at 19a-21a (Alarcón, J., dissenting); *id.* at 29a (O'Scannlain, J., dissenting from denial of rehearing en banc).

2. In *United States* v. *Ivy*, 929 F.2d 147, cert. denied, 502 U.S. 883 (1991), the Fifth Circuit endorsed the Third Circuit's decision in *Rosenberg*, stated that "[w]e, too, refuse to judicially append the relation element to § 844(h)(2)," and rejected the defendant's argument that the district court had erred in refusing to instruct the jury that it could not convict unless "the defendant carried the explosives 'during and in relation to' the kidnapping." *Id.* at 151.

The Fifth Circuit's rejection of a relational element in *Ivy* was not "an alternative holding," App., *infra*, 7a, or "best regarded as dicta," Resp. C.A. Reh'g Br. 17 n.4. The defendant in *Ivy* raised two distinct claims: (1) that the evidence was insufficient to demonstrate he carried the explosives during the felony; and (2) that the judge erred in refusing to instruct the jury that he must have carried the explosive "during and in relation to" the felony. *Ivy*, 929 F.2d at 151. The court considered the sufficiency of the evidence of "carrying" first.[1] *Ibid.* The principal thrust of the sufficiency argument was that the explosive device was in the trunk of the defendant's car,

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[1] Respondent here has conceded that he "carried" the explosives found in the trunk of his car. See App., *infra*, 12a.

which remained at the site of the original abduction while the defendant and the estranged wife embarked on a multi-state tour in her car. *Id.* at 149, 151. The court of appeals, however, emphasized that the explosive device facilitated the original abduction, and thus was carried during the offense. *Id.* at 151. In reaching that conclusion, the court pointed to evidence that might have satisfied an "in relation to" element, "[t]he evidence was sufficient to support the jury's conclusion that the bomb facilitated the kidnapping and established an offense under § 844," but only in the context of finding ample evidence of carrying. *Ibid.* Cf. *Muscarello* v. *United States*, 524 U.S. 125, 127 (1998) (holding that a defendant "carries a firearm" within the meaning of 18 U.S.C. 924(c)(1) in situations where the firearm is contained "in the locked glove compartment or trunk of a car[] which the person accompanies").

The court then went on to address the argument that the judge erred in failing to instruct the jury concerning the "and in relation to" element. *Ivy*, 929 F.2d at 151. *Ivy*'s rejection of a relational element under Section 844(h)(2) was independent of its sufficiency holding and necessary to support the court's judgment. Although a trial court's failure to instruct a jury on an element of a criminal offense may be harmless error, see *Neder* v. *United States*, 527 U.S. 1 (1999), the Fifth Circuit's opinion contains no harmlessness analysis and to the contrary the court expressly held that no instructional error occurred. See *Ivy*, 929 F.2d at 151. Accordingly, *Ivy*'s conclusion that "Section 844(h)(2) * * * does not include the relation element Ivy urges," *ibid.*, was essential to the result in that case.

This 2-1 conflict among published court of appeals decisions merits this Court's review.[2] Although the issue has not generated a volume of published opinions, it is increasingly important in terrorism prosecutions. Moreover, the government's ability to obtain an appropriate sentence for an attempted act of international terrorism should not depend on whether the defendant attempted to enter the United States through Washington State rather than New Jersey, Pennsylvania, or Texas.

B. The Court Of Appeals' Decision Incorrectly Constricts The Scope Of 18 U.S.C. 844(h)(2)

The decision of the court of appeals not only conflicts with the decisions of other courts of appeals, it is incorrect as well. Nothing in Section 844(h)(2)'s text indicates that the government must establish that the explosives were carried in relation to the underlying felony. The contrast between the text of Section 844(h)(1) and (2) as well as the presence of an express relational requirement in current Section 924(c)(1)(A), the provision whose predecessor provided the model for Section 844(h)(2), confirm that the omission of such an element from Section 844(h)(2) reflects a deliberate choice. Nor does the court of appeals' own decision in *United States*

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[2] As Judge O'Scannlain observed (App., *infra*, 29a), the court of appeals' decision also conflicts with the Sixth Circuit's unpublished decision in *United States* v. *Jenkins*, 229 Fed. Appx. 362 (2005), cert. denied, 126 S. Ct. 2022 (2006). In *Jenkins*, the court of appeals stated that *Rosenberg* "correctly interpret[s] the statute," and it rejected the defendant's assertion that the government had been required to "show that the explosives were used to *further* the commission of the underlying crime." *Id.* at 365, 367; see *ibid.* ("[T]he plain language of [Section 844(h)(2)] does not require a relational element.").

v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), which construed a different statute with different language and a different legislative history, warrant interpreting Section 844(h)(2) to contain an unstated relational element.

1. The starting point for statutory construction is "the language of the statute." *Bailey* v. *United States*, 516 U.S. 137, 144 (1995). "And where the statutory language provides a clear answer," the analysis "ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999).

Section 844(h)(2) mandates enhanced punishment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." As the Third Circuit has observed, "[t]he plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.'" *Rosenberg*, 806 F.2d at 1178-1179 (citation omitted). "Thus, under the first criterion in the interpretative hierarchy, a natural reading of the full text, [a relational nexus] would not be an element of [Section 844(h)(2)]." *United States* v. *Wells*, 519 U.S. 482, 490 (1997) (citation omitted); see App., *infra*, 29a (O'Scannlain, J., dissenting from denial of rehearing en banc) (stating that "the plain language of § 844(h)(2) says nothing about a relational element").

The contrast between Section 844(h)(1) and (2) confirms that the latter does not mandate proof that the explosives were carried in relation to the underlying felony. Whereas Section 844(h)(1) requires that the fire or explosives have been "use[d] * * * to commit" that felony, Section 844(h)(2) provides that the explosives must only have been "carrie[d] * * * during the commission of" it. Because subsection (h)(1) clearly requires

proof that the fire or explosives "aided the commission of the underlying felony in some way," App., *infra*, 13a, subsection (h)(2)'s use of the passive voice underscores that the only connection mandated by that provision is a temporal one.

A dissenting judge in *Rosenberg* argued that Section 844(h)(2) must contain an implicit relational element in order for the words "'the commission of'" to retain "some independent meaning." 806 F.2d at 1181 n.2 (Higginbotham, J., dissenting) (quoting 18 U.S.C. 844(h)(2) (1982)). But Judge Higginbotham did not explain how the words "the commission of" can be understood as "connecting the possession of illegal explosives to the *perpetration* of some other felonious act," *id.* at 1180-1181, and, as we have already explained, see pp. 14-15, *supra*, the contrast between the language of Sections 844(h)(1) and (h)(2) confirms that (h)(2) requires no such connection. Nor does such an interpretation result in surplusage, because the words "the commission of" confirm that it is the defendant—rather than some other individual—who must commit the underlying felony "during" which the explosives are carried.

The panel majority made no attempt to identify a source in the statutory language for its holding that Section 844(h)(2) contains a relational element. Instead, it relied on circuit precedent construing another statute (former 18 U.S.C. 924(c)(2) (1982)), the relationship between that statute and Section 844(h)(2), and the manner in which Section 844(h)(2) has evolved over time. App., *infra*, 8a-11a. But "[t]he starting point is discerning congressional intent is the existing statutory text, and not the predecessor statutes." *Lamie*, 540 U.S. at 534 (citation omitted). And "when the statute's language is plain, the sole function of the courts—at least where

the disposition required by the text is not absurd—is to enforce it according to its terms." *Ibid.* (citation omitted).

There is nothing absurd about severely punishing any person who carries an explosive while committing another felony. As Judge O'Scannlain observed, "[t]he carrying of an explosive * * * greatly increases the risk of injury or death to others," especially given the high risk that explosives "may go off accidentally." App., *infra*, 28a n.1. Although the mandatory consecutive ten-year sentence provided by Section 844(h)(2) might plausibly be characterized as harsh in some cases—though certainly not in this one—harshness of punishment alone is insufficient to render a statute's clear meaning absurd or ambiguous. See *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992); see also *Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). Nor is the rule of lenity at issue in this case. Because the rule is a "maxim of statutory construction," it "cannot dictate an implausible interpretation of a statute, nor one at odds with the generally accepted contemporary meaning of a term." *Taylor* v. *United States*, 495 U.S. 575, 596 (1990).

Because the power to make laws resides with the legislature, it is improper for courts to "read * * * absent word[s] into [a] statute." *Lamie*, 540 U.S. at 538. The court of appeals' decision in this case does precisely that by "add[ing] an element to § 844(h)(2) that does not appear in the statute enacted by Congress." App., *infra*, 18a (Alarcón, J., dissenting); see *Rosenberg*, 806 F.2d at 1179 ("It is not fitting for this court to declare that the

crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute.").

2. The court of appeals' conclusion that Section 844(h)(2) contains an unstated relational requirement also affords insufficient weight to the fact that such a requirement is set forth expressly in a closely related provision. The manner in which the two statutes have evolved, moreover, confirms the significance of that distinction.

As the panel recognized, see App., *infra*, 9a-10a, Section 844(h)(2) was modeled after the predecessor of 18 U.S.C. 924(c)(1)(A), which prohibits the use or carrying of a firearm during certain specified offenses. See H.R. Rep. No. 1549, 91st Cong., 2d Sess. 69 (1970) ("Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a Federal felony."). In its current form, Section 924(c)(1)(A) provides that the firearm must have been used or carried "during *and in relation to*" an underlying "crime of violence or drug trafficking crime." 18 U.S.C. 924(c)(1)(A) (emphasis added). Given the close connection between the two provisions, the omission of comparable language from Section 844(h)(2) would appear to reflect an "intentional[] and purpose[ful]" choice. *Russello* v. *United States*, 464 U.S. 16, 23 (1983). Indeed, "the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. Rather, the question is whether Congress intended its different words to make a legal difference." *Burlington N. & Sante Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) (citations omitted).

The manner in which Section 844(h)(2) has evolved confirms that Congress's failure to include a relational

element in that statute was deliberate. When Section 844(h)(2) was originally enacted in 1970, both it and Section 924(c)(2) prohibited "carr[ying] [a firearm or an explosive] unlawfully during the commission of any felony which may be prosecuted in a court of the United States." See 18 U.S.C. 844(h)(2) (1982) (App., *infra*, 33a); 18 U.S.C. 924(c)(2) (1982) (App., *infra*, 36a). In 1984, Congress amended the firearms statute to remove the word "unlawfully" and add "and in relation to" after "during." See Pub. L. No. 98-473, § 1005, 98 Stat. 2138 In 1985, the Ninth Circuit concluded that the pre-1984 firearms statute had contained an implicit relational element. See *Stewart*, 779 F.2d at 540. In 1986, the Third Circuit held that the explosives statute "has no relational element." *Rosenberg*, 806 F.2d at 1179. And in 1988, Congress amended Section 844(h)(2) by eliminating the word "unlawfully" without at the same time adding "and in relation to." See Act of Nov. 18, 1988, Pub. L. No. 100-690, § 6474(b), 102 Stat. 4379. Although the legislative history of the 1988 amendment to Section 844(h)(2) "does not specifically say why 'unlawfully' was struck, or why 'and in relation to' was not added," App., *infra*, 11a,[3] the best explanation is that Congress, faced

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[3] The "Senate Report" to which the court of appeals referred (App., *infra*, 11a) is a section-by-section bill analysis drafted and placed in the Congressional Record by Senator Biden, the then-Chairman of the Judiciary Committee. See 134 Cong. Rec. 32,692 (1988). The two sentences that follow the one partially quoted by the court of appeals make clear that the need "to bring [Section 844(h)(2)] in line with" Congress's then-recent amendments to Section 924(c) involved a disparity in penalty rather than a general intent for the two statutes to be identical in every respect. See *id.* at 32,700 ("Presently, as a result of the above-referenced amendments to 18 U.S.C. 924(c), a person who uses a firearm to commit a bank robbery would be subject to harsher penalties

with the "divergent decisions" in *Stewart* and *Rosenberg*, chose not to incorporate into Section 844(h)(2) the relational element that it had recently added to Section 924(c)(1)(A). App., *infra*, 28a (O'Scannlain, J., dissenting from denial of rehearing en banc).

3. The court of appeals' earlier decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985), does not support reading into Section 844(h)(2) a relational element that appears nowhere in the statutory text. *Stewart* construed a different statute that was amended at a different time and in different ways. See pp. 17-18, *supra*. And if Congress's subsequent addition of the words "and in relation to" can shed light on the meaning of pre-amendment Section 924(c)(2), see *Stewart*, 779 F.2d at 540, surely Congress's failure to add those same words suggests something about the meaning of current Section 844(h)(2).

Stewart itself, moreover, did not attempt to explain how its holding was consistent with the governing statutory text of Section 924(c), let alone make any claim about Section 844(h). Moreover, subsequent opinions of this Court render the opinion's heavy reliance "upon the legislative history of an amendment to determine the scope of the pre-amendment statute * * * questionable." App., *infra*, 31a n.3 (O'Scannlain, J., dissenting from denial of rehearing en banc). See, *e.g.*, *Jones* v. *United States*, 526 U.S. 227, 238 (1999) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.") (internal quotation marks and citations omitted)); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S.

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than a person who committed the same offense using an explosive. There is no justification for this disparity.").

164, 185 (1994) ("[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.") (quoting *Public Employees Ret. Sys.* v. *Betts*, 492 U.S. 158, 168 (1989). Even if such evidence may properly be considered, *Stewart* acknowledged that the legislative history of the 1984 amendment to Section 924(c) was "not entirely free of ambiguity," 779 F.2d at 540, and *Stewart*'s interpretation of that history is debatable. See *Rosenberg*, 806 F.2d at 1178 (concluding that the Senate Report relied upon by the *Stewart* court "[a]t most * * * fails to explain why the 'in relation to' phrase was added to the [firearms] statute"). Finally, although *Stewart* concluded that firearms statute's "evident purpose * * * necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm," 779 F.2d at 540, "the fact that a statute can be 'applied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985) (citation omitted)).

C. The Question Presented Is Of Substantial Importance

Review is also warranted because the question presented is important. As the relatively small number of reported decisions suggest, Section 844(h)(2) is not a frequently used provision. And it may be that in many cases the government will be able to establish that the carrying of explosives "facilitated or played a role in" (App., *infra*, 12a (citation omitted)) the underlying offense.

But that will not always be the case. Unlike the firearms statute, which applies only when the weapon is used or carried in connection with "a crime of violence or drug trafficking crime," 18 U.S.C. 924(c)(1)(A), Section 844(h)(2) is applicable whenever an explosive is "carrie[d] * * * during the commission of any felony." Many federal felonies—such as the false statement offense charged as the underlying felony in this case—may not ordinarily lend themselves to proof that the explosives "aided the commission of the underlying felony" (App., *infra*, 13a), even though the explosives' mere presence "greatly increases the risk of injury or death to others." *Id.* at 28a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc).

The court of appeals' holding is likely to be particularly significant in terrorism cases where a defendant ultimately intends to employ the explosives but is apprehended before the plan is put into action. A distinct federal offense whose commission would be facilitated by the carrying of explosives may not yet have evolved sufficiently to permit its proof beyond a reasonable doubt. Or the evidence necessary to establish such an offense may be unavailable for use at trial, either because of national security concerns or because the evidence is in the custody of foreign governments. In such circumstances, the Ninth Circuit's decision could substantially diminish Section 844(h)(2)'s usefulness as a tool for combating terrorist-related activity and thus make it more difficult to obtain appropriate punishment in such cases.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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OCTOBER 2007

APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

Nos. 05-30422, 05-30441

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

AHMED RESSAM, ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT-APPELLEE

UNITED STATES OF AMERICA, PLAINTIFF-APPELLEE

v.

AHMED RESSAM, ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT-APPELLANT

Filed: Jan. 16, 2007

Before: ALARCÓN, RYMER, and BERZON, Circuit Judges.

RYMER, Circuit Judge:

Ahmed Ressam trained with members of al Qaeda in Afghanistan and hatched a plot to detonate explosives at Los Angeles International Airport (LAX) in the days before the new Millennium. He was charged with, and convicted of, nine counts of criminal activity connected to this plot. Ressam challenges his conviction on one of

these counts, Count 9, for carrying an explosive during the commission of a felony—making false statements on a customs declaration—in violation of 18 U.S.C. § 844(h)(2). The issue is whether § 844(h)(2) must be read to include a relational element such that the crime is carrying an explosive during *and in relation to* commission of a felony. We previously construed the statute upon which § 844(h)(2) was modeled, 18 U.S.C. § 924(c), to require this relational element, *United States v. Stewart*, 779 F.2d 538, 539-40 (9th Cir. 1985), even though it, too, lacked the phrase "and in relation to." We are constrained to follow *Stewart's* analysis here and conclude that § 844(h)(2) requires a relationship between the underlying crime and the act of carrying an explosive. As the jury was neither instructed that such a relationship was a required element of the offense, nor did the government offer evidence that Ressam's explosives were used to facilitate his false customs declaration, his conviction on Count 9 must be reversed.

Ressam was exposed to a sentence of some 65 years, but after trial entered into a cooperation agreement with the United States according to which he would not seek, and the government would not recommend, a sentence of less than 27 years. Although he provided testimony and participated in numerous debriefings, Ressam ultimately stopped cooperating. As a result, the government recommended a sentence of 35 years. Ressam argued for a sentence of 120 months, and the district court imposed a sentence of 22 years. The government appeals this sentence as unreasonable in light of Ressam's failure to continue to assist the government and the district court's lack of explanation for what the government believes is an extreme departure. Given reversal of the conviction on Count 9 and its corresponding mandatory

minimum sentence of 10 years, we vacate the entire sentence so that the district court can resentence in light of this decision and developments in the law of sentencing in the meantime.

I

Ressam is an Algerian citizen. He left Algeria in 1992 for France, where he was arrested on an immigration-related violation. Ressam then obtained a genuine French passport under the name of Anjer Tahar Medjadi and fled for Montreal in February of 1994. Using his true name, Ressam sought asylum in Canada, claiming that he had been falsely accused by the Algerian government of aiding Islamist insurgents and had served 15 months in prison. His petition was denied, but Ressam was allowed to stay in Canada because of a moratorium on deportations to Algeria.

Ressam met an al Qaeda operative in Montreal named Abderraouf Hannachi sometime in 1998. Hannachi recruited individuals to train in al Qaeda camps in Afghanistan and to participate in jihadist activities. Using a forged Catholic baptismal certificate, Ressam obtained a Canadian passport in the name of Benni Antoine Noris in order to travel to Afghanistan. In March of 1998, Ressam—traveling as Benni Noris—left Montreal for Karachi, Pakistan.

Once in Pakistan, Ressam met Abu Zubaydah, who arranged Ressam's travel to the Khalden training camp in Afghanistan. Ressam stayed with an Algerian terror group at Khalden for six months. During that time, he received firearms training and learned how to fire a rocket-propelled grenade launcher. Al Qaeda operatives at the camp taught Ressam to make explosive charges and showed him how to detonate particular types of

plastic explosives. Ressam also learned how to destroy infrastructure targets, such as power plants, military installations, railroads, and airports. He later went to a second camp near Jalalabad where he received further training in explosives. It was during this time that Ressam and others hatched the plot to target a U.S. airport to coincide with the Millennium.

Ressam returned to Canada via LAX in February of 1999. He carried bomb-making notes, two chemicals used to manufacture explosives, and $12,000 in cash. Ressam resettled in Montreal where he continued to plan the LAX attack. On November 17, 1999, Ressam and Abdelmajid Dahoumane, another member of the Montreal al Qaeda cell, traveled to Vancouver, British Columbia. Ressam and Dahoumane rented a Chrysler 300M and checked into a motel. On December 14, 1999, Ressam and Dahoumane loaded the trunk of the rental car with explosives, electronic timing devices, detonators, fertilizer, and aluminum sulfate. They drove to the ferry terminal at Tswassen, British Columbia. Dahoumane returned by bus to Vancouver while Ressam, using his Benni Noris passport, boarded the MV Coho, a ferry bound for Port Angeles, Washington. U.S. Customs inspectors[1] searched the trunk of Ressam's car as part of a pre-screening process prior to departure. They did not discover the explosives which were hidden in the trunk's spare tire well.

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[1] The Homeland Security Act of 2002, Pub. L. No. 107-296, § 403, 116 Stat. 2135, transferred the U.S. Customs Service from the Treasury Department to the Department of Homeland Security. The agency is now known as U.S. Customs and Border Protection. We refer to the agency as the Customs Service because Ressam was apprehended prior to the reorganization.

The MV Coho docked at Port Angeles about 6:00 p.m. Customs Inspector Diana Dean was finishing her day shift when Ressam drove his vehicle off the ferry. He steered the car into the middle lane where Dean stopped him for inspection. Dean asked Ressam about his travel plans. His answers indicated that he was nervous and agitated. Dean asked Ressam to complete a customs declaration—which he signed as Benni Noris. Dean directed Ressam to a secondary inspection station where Customs inspectors searched the vehicle. The inspectors discovered what were later identified as the bomb's component parts. At the time, they believed Ressam was attempting to smuggle narcotics into the country.

The substances were inventoried and tested. Agents found two primary explosives (hexamethylene triperoxide diamine (HMTB) and cyclotrimethylene trinitramine (RDX)) in a Tylenol pill bottle and zinc lozenge case, a secondary explosive (ethylene glycol dinitrate (EGDN)) poured into two olive oil jars, fertilizer which can provide fuel for an explosion, and aluminum sulfate. Agents also found Ressam's fingerprints on four plastic boxes that contained timing devices. EGDN is a powerful explosive that packs twice the punch of the equivalent amount of TNT. The detonation of the bombs during the holiday travel rush at LAX would likely have killed and injured hundreds of people.

On February 14, 2001, the grand jury returned a nine-count Second Superceding Indictment against Ressam.[2] It charged Ressam with an act of terrorism transcending a national boundary, placing explosives in

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[2] Dahoumane, who was a fugitive at the time, was also charged in four of the counts. Algerian security services arrested Dahoumane in March 2001.

proximity to the ferry terminal, possessing false identification, using a fictitious name, falsely identifying himself on a customs declaration form, the smuggling of and transportation of explosives, the illegal possession of a destructive device, and carrying an explosive during the commission of a felony, namely, signing the customs form as Benni Noris. The district court ordered the trial moved from Seattle to Los Angeles due to pre-trial publicity.

Ressam filed a Federal Rule of Criminal Procedure 29 motion on Count 9, arguing that the act of carrying explosives had not played a role in the false statement made on the customs form. The district court denied the motion. Ressam also objected to the government's proposed jury instruction on Count 9 because it lacked a relational requirement, which the district court overruled. On April 6, 2001, the jury convicted Ressam on all counts.

Ressam's sentencing was delayed until July 27, 2005. Ressam provided extensive cooperation until early 2003, when he basically stopped cooperating. In February of that year Ressam asked the court to proceed with sentencing, but at the court's instigation, the government filed a motion under U.S.S.G. § 5K1.1 to allow a downward departure from the Guidelines range for substantial assistance. Still, Ressam did not resume cooperation. The court set a hearing for April 27, 2005, but decided on its own to give Ressam three more months in order to be able to give him as much credit as possible for cooperation. No additional cooperation was forthcoming before the reconvened hearing in July. The district court imposed a sentence of 22 years in custody and instructed the government "to allocate that according to

the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years." It expressed no view on an appropriate Guidelines range, including the effect of the factors bearing on substantial assistance to authorities in § 5K1.1, and offered no explanation for imposition of the particular sentence in consideration of the factors in 18 U.S.C. § 3553(a).

The United States appeals the sentence, and Ressam cross-appeals his conviction on Count 9.

II

Ressam's cross-appeal boils down to what 18 U.S.C. § 844(h)(2) means when it punishes one who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States," with a mandatory term of imprisonment of 10 years. Does it criminalize carrying an explosive during the commission of another felony, or does it criminalize carrying an explosive during and *in relation to* that other felony? The answer matters in this case because the government offered no evidence that Ressam's carrying the explosives in any way facilitated his falsifying the customs declaration form.

This is an issue of first impression for us, although the Third and Fifth Circuits have declined to interpret § 844(h)(2) as requiring that the explosives be carried in relation to the underlying felony. *See United States v. Rosenberg*, 806 F.2d 1169, 1179 (3d Cir. 1986); *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991) (following *Rosenberg* in an alternative holding). As these courts see it, "the plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.

. . .' It is not fitting for this court to declare that the crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute." *Rosenberg*, 806 F.2d at 1178-79 (internal citation omitted); *Ivy*, 929 F.2d at 151 (citing *Rosenberg*, 806 F.2d at 1177). *But see Rosenberg*, 806 F.2d at 1180-1183 (Higginbotham, J., dissenting).

Unlike our colleagues in other circuits, we do not write on a clean slate. We interpreted a similar provision in the firearms statute, 18 U.S.C. § 924(c), in *United States v. Stewart*, 779 F.2d 538, 539-540 (9th Cir. 1985), *overruled in part on other grounds by United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996). Section 924(c) as written when Stewart committed his offense provided that it was a crime to "carr[y] a firearm unlawfully during the commission of any felony. . . ." 18 U.S.C. § 924(c)(2) (1982). Later, in 1984, it was amended to substitute for the word "during" the phrase "during *and in relation to.*" 18 U.S.C. § 924(c) (1985) (emphasis added). The word "unlawfully" was also deleted. Our review of the legislative history indicated that the new "in relation to" language was not intended to create an element of the crime that did not previously exist, but rather was intended to make explicit what had been implicit before—that a relation between the firearm and the underlying felony was required. *Stewart*, 779 F.2d at 539-40. The legislative history also indicated that when "unlawfully" was eliminated, the "in relation to" language was added to allay concern that a person could be prosecuted for committing an entirely unrelated crime while in possession of a firearm, but the "in relation to" language did not alter the scope of the statute. *Id.* As then-Judge Kennedy explained, "the evident purpose of the [original] statute was to impose more

severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony." *Id.* at 540. "That purpose necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm." *Id.* Consequently, we interpreted the statute that applied to Stewart as if it contained the requirement that the firearm be possessed "during and in relation to" the underlying crime. Put differently, the relational requirement "has always been an implicit element of the crime even before Congress amended § 924 to include the specific 'in relation to' language." *United States v. Mendoza*, 11 F.3d 126, 129 (9th Cir. 1993) (describing *Stewart's* holding).

While *Rosenberg* and *Ivy* were free to (and did) reject *Stewart's* analysis of § 924(c), we cannot. Therefore, we must decide whether a relational requirement has always been an implicit element of § 844(h)(2), as well. The two sections have much in common, and we are mindful of the canon *in pari materia* which provides that similar statutes are to be interpreted in a similar manner unless legislative history or purpose suggests material differences. *See, e.g., Fogerty v. Fantasy, Inc.*, 510 U.S. 517, 523-24, 114 S. Ct. 1023, 127 L. Ed .2d 455 (1994); *John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank*, 510 U.S. 86, 104-106, 114 S. Ct. 517, 126 L. Ed. 2d 524 (1993); *U.S. West Comm., Inc. v. Hamilton*, 224 F.3d 1049, 1053 (9th Cir. 2000).

Section 844 was enacted as part of Title XI of the Organized Crime Control Act of 1970. Pub. L. No. 91-452, 84 Stat. 922, 956. Its purpose was to align explosives with the firearms provisions in § 924(c), and it was modeled after § 924(c). *United States v. Mueller*, 463 F.3d 887, 891 (9th Cir. 2006). The House Report ex-

plains that "Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 [codified at 18 U.S.C. § 924(c)] relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a federal felony." H.R. Rep. 91-1549, *reprinted in* 1970 U.S.C.C.A.N. 4007, 4046. Its original text was identical to the original firearms counterpart that we considered in *Stewart*. Thus, the original version of § 924(c) provided:

> Whoever—
>
> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States . . .

And the original version of § 844(h) provided:

> Whoever—
>
> (1) uses an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive unlawfully during the commission of any felony which may be prosecuted in a court of the United States . . .

Congress amended § 844(h)(2) in 1988 by striking "unlawfully" in paragraph (2), as the 1984 revisions to § 924(c) had done. Pub. L. No. 100-690, § 6474(b).[3] By

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[3] The current version of § 844(h) provides, in pertinent part:

> (h) Whoever—
>
> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

contrast with the 1984 amendment to § 924(c), however, the word "during" was not replaced with "during and in relation to." The legislative history does not specifically say why "unlawfully" was struck, or why "and in relation to" was not added. The Senate Report simply indicates that the new version strengthened the penalty provisions of § 844(h) for "using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted in the Comprehensive Crime Control Act of 1984. . . ." S. Rep. at 17367.

Because in *Stewart* we did not think addition of the phrase "and in relation to" changed the scope of original § 924(c), we are hard-pressed now to say that its absence changes the scope of § 844(h)(2). In other words, accepting that § 924(c) always had a relational element, as we must, § 844(h)(2) necessarily always had a relational element, too. For this reason, we cannot accord the same weight as the government, and the Third Circuit, give to the fact that § 844(h)(2) was not altered as § 924(c) was to add "and in relation to" language.[4]

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(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years.

[4] The government's brief argued that, unlike § 924(c), § 844(h)(2) never contained a requirement that the explosive be carried "*unlawfully* during commission of any felony." However, this assertion is incorrect, as the government has subsequently acknowledged.

Judge Alarcón contends that *Stewart* has been undercut by intervening authority. Yet neither *Stewart's* holding, nor the "theory or reasoning" underlying the decision, has been called into question by this court sitting en banc or by the United States Supreme Court. The dissent's citation to *Lamie v. United States Trustee*, 540 U.S. 526, 538, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004)—a case interpreting a bankruptcy statute—as supervening authority is inapposite. *Lamie* did not articulate a new rule of statutory interpretation; it did not construe § 844(h)(2) or § 924(c); and there was no prior construction of a similar statute to contend with. Nothing about its holding, reasoning, or mode of analysis is irreconcilable with *Stewart's* determination that a relational element was always implicit in the phrase "carries a firearm . . . during." Accordingly, we are obliged to follow *Stewart's* construction of § 924(c), which served as the template for § 844(h). *See Mueller*, 463 F.3d at 891.

Given this interpretation, there is no real dispute that Ressam's conviction on Count 9 cannot stand. The government introduced ample evidence that Ressam falsely signed the customs form as Benni Noris and that he carried explosives in the trunk of his car. Ressam so concedes. However, the evidence adduced at trial does not show that the explosives "facilitated or played a role in the crime" of lying on the customs declaration. *See* Ninth Cir. Model Crim. Jury Instr. No. 8.65; *Stewart*, 779 F.2d at 540 (contrasting Stewart's case with circumstances showing a violation of § 924(c) as interpreted, such as "the firearm facilitated or had a role in the crime, such as emboldening an actor who had the opportunity or ability to display or discharge the weapon to protect himself or intimidate others, whether or not such

display or discharge in fact occurred"). It is not enough for the government to prove that Ressam lied *because* he was smuggling explosives in the trunk of his car. Rather, the government must demonstrate that the explosives aided the commission of the underlying felony in some way. There is no evidence that the explosives emboldened Ressam to lie or that he used them to "protect himself or intimidate others." *Id.* Accordingly, we vacate Ressam's conviction as to Count 9 only.

III

The government believes that Ressam's sentence is unreasonable and seeks to have it vacated because the district court failed to balance the cooperation that Ressam provided against the magnitude of his crimes and his continued aid to terrorists by his failure to complete his promised assistance. We decline to address the merits of the government's position for two reasons. First, Ressam's conviction on Count 9 having been reversed, his sentence on that count necessarily falls as well. The district court articulated no basis upon which we could infer whether its sentence would be the same, or different, without a conviction on this count. We prefer to leave it to the district court in the first instance to arrive at an appropriate sentence on the remaining counts of conviction. Even more significantly, the law applicable to sentencing is in flux. We are rehearing two cases en banc, *United States v. Carty*, 453 F.3d 1214 (9th Cir. 2006) *reh'g en banc granted*, 462 F.3d 1066 (9th Cir. 2006), and *United States v. Zavala*, 443 F.3d 1165 (9th Cir. 2006) *reh'g en banc granted*, 462 F.3d 1066 (9th Cir. 2006), and the United States Supreme Court has granted writs of certiorari in *Claiborne v. United States*, 75 U.S.L.W. 3243, 3246 (U.S. Nov. 3, 2006) (No.

06-5618), and *Rita v. United States*, 75 U.S.L.W. 3243, 3246 (U.S. Nov. 3, 2006) (No. 06-5754), which will have a good deal to say about the sentencing process in the wake of *United States v. Booker*, 543 U.S. 220, 125 S. Ct. 738, 160 L. Ed. 2d 621 (2005). As the district court should have the initial opportunity to impose a sentence consistent with evolving law, we leave it to that court's discretion to defer resentencing until the Supreme Court has decided *Claiborne* and *Rita*, or we have decided *Carty* and *Zavala*.

REVERSED IN PART; VACATED IN PART and REMANDED.

ALARCÓN, Circuit Judge, concurring in part and dissenting in part:

I respectfully dissent from the majority's decision to reverse Count 9 of the Second Superceding Indictment. I also concur in the majority's decision to vacate the sentence but on different grounds. I agree with the Government that the sentence imposed by the District Court was unreasonable and an extreme departure from the advisory Sentencing Guidelines.

I

Count 9 reads as follows:

> On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is making a false statement to a U.S. Customs Inspector as charged in Count 5

herein. All in Violation of Title 18, United States Code, Section 844(h)(2)

Section 844(h)(2) provides as follows:

> Whoever—. . . (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years.

In Count 5 of the indictment, Mr. Ressam was charged as follows:

> On or about December 14, 1999, at Port Angeles, within the Western District of Washington, in a matter within the jurisdiction of the United States Custom Service, an agency of the United States, AHMED RESSAM did knowingly and willfully make a false, fraudulent, and fictitious material statement and representation; in that the defendant presented to the U.S. Customs inspectors a Customs Declarations Form # 6059B identifying himself as Benni Noris, whereas in truth and fact, as he then well knew, this statement was false in that his true name is AHMED RESSAM. All in violation of Title 18, United States Code, Section 1001.

The district court gave the following instruction to the jury concerning the elements that the Government was required to prove to demonstrate a violation of § 844(h)(2).

> The defendant is charged in Count 9 of the indictment with carrying an explosive during the commission of a felony in violation of Section 844(h)(2) of Title 18 of the United States Code. In order for the

defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.

First, the defendant knowingly carried explosive materials; and

Second, the defendant committed the felony of making a false statement to a U.S. Customs Inspector (as charged in Count 5 of the Indictment) while he was carrying those explosive materials.

In his opening brief, Mr. Ressam concedes that "[t]he government did present evidence that Mr. Ressam was carrying explosives in the trunk of the car he was driving at the time he completed and presented the customs form, and that Mr. Ressam falsely identified himself on the form." Opening Brief of Appellant at 18. Mr. Ressam does not argue that the words used by Congress in § 844(h)(2) are ambiguous or lack plain meaning.

The Supreme Court instructed in *Tennessee Valley Authority v. Hill,* 437 U.S. 153, 98 S. Ct. 2279, 57 L. Ed. 2d 117 (1978) that: "When confronted with a statute which is plain and unambiguous on its face, we ordinarily do not look to legislative history as a guide to its meaning." *Id.* at 184, 98 S. Ct. 2279 n.29. In *United States v. Missouri Pac. R. Co.,* 278 U.S. 269, 49 S. Ct. 133, 73 L. Ed. 322 (1929), the Court stated: "where the language of an enactment is clear, and construction according to its terms does not lead to absurd or impracticable consequences, the words employed are to be taken as the final expression of the meaning intended." *Id.* at 278, 49 S. Ct. 133.

More recently, in *Lamie v. United States Trustee*, 540 U.S. 526, 124 S. Ct. 1023, 157 L. Ed. 2d 1024 (2004), Justice Kennedy, writing for the majority, stated:

> The starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes. It is well established that when the statute's language is plain, the sole function of the courts—at least where the disposition required by the text is not absurd—is to enforce it according to its terms. (internal citations and quotation marks omitted).

Id. at 534, 124 S.Ct. 1023.

Mr. Ressam argues that we must read the words "in relation to" into the text of § 844(h)(2). He contends that we must reverse because the court refused an instruction he submitted that states as follows:

> The defendant is charged in Count 9 of the Indictment with knowingly carrying an explosive during and in relation to a felony prosecutable in a court of the United States in violation of Section 844(h)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.
>
> First, the defendant committed the crime of making a false statement to a United States customs inspector as charged in Count 5 of the Indictment;
>
> Second, the defendant knowingly carried an explosive; and

> Third, the defendant carried the explosive *during and in relation to the false statement crime* alleged in Count 5 of the Indictment.
>
> A defendant takes such action *in relation to the crime* if the explosive facilitated or played a role in the false statements charge alleged in Count 5.

(emphasis added).

Mr. Ressam's proposed instruction would have required the District Court to add an element to § 844(h)(2) that does not appear in the statute enacted by Congress. Justice Kennedy, in his opinion in *Lamie*, rejected a similar notion:

> Petitioner's argument stumbles on still harder ground in the face of another canon of interpretation. His interpretation of the Act—reading the word "attorney" in § 330(a)(1)(A) to refer to "debtors' attorneys" in § 330(a)(1)—would have us read an absent word into the statute. That is, his argument would result "not [in] a construction of [the] statute, but, in effect, an enlargement of it by the court, so that what was omitted, presumably by inadvertence, may be included within its scope." *Iselin v. United States*, 270 U.S. 245, 251, 46 S. Ct. 248, 70 L. Ed. 566 (1926). With a plain, non-absurd meaning in view, we need not proceed in this way. *"There is a basic difference between filling a gap left by Congress' silence and rewriting rules that Congress has affirmatively and specifically enacted."* *Mobil Oil Corp. v. Higginbotham*, 436 U.S. 618, 625, 98 S. Ct. 2010, 56 L. Ed. 2d 581 (1978).

> Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from "deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill." *United States v. Locke*, 471 U.S. 84, 95, 105 S. Ct. 1785, 85 L. Ed. 2d 64 (1985) (citing *Richards v. United States*, 369 U.S. 1, 9, 82 S. Ct. 585, 7 L. Ed. 2d 492 (1962)).

540 U.S. at 538, 124 S. Ct. 1023. (emphasis added).

We lack the constitutional authority to add an element to a criminal statute. That is Congress' function. Our role is merely to interpret what Congress has enacted.

II

This Court has not previously addressed the question whether a trial court must instruct a jury that, to convict under § 844(h)(2), the Government must prove beyond a reasonable doubt that the defendant carried explosives *during and in relation to* the commission of a felony which may be prosecuted in a court of the United States. The Third and Fifth Circuits have expressly rejected this contention.

In *United States v. Rosenberg*, 806 F.2d 1169 (3rd Cir. 1986), the Third Circuit affirmed a judgment of conviction for a violation of § 844(h)(2), wherein the trial court rejected the defendants' argument that the Government was required to present evidence of a specific connection between the carrying of explosives and the alleged felony. The Third Circuit reasoned as follows:

> Section 844(h)(2) by its terms only requires that the government show that the defendant unlawfully carried an explosive "during the commission of any felony." The plain everyday meaning of "during" is "at the same time" or "at a point in the course of." *See*, Webster's Third New International Dictionary 703 (1961). It does not normally mean "at the same time and in connection with. . . ." It is not fitting for this court to declare that the crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute. If Congress sees fit to add a relational element to § 844(h)(2), it is certainly free to do so, in the same manner that it added a relational element to § 924(c). Until such time, we will hold that § 844(h)(2) has no relational element, and accordingly, we now hold that the district court correctly denied the defendants' motion to dismiss Count 5.

Id. at 1178-79.

The Third Circuit's determination in *Rosenberg* that a federal court cannot read absent words into a statute is faithfully consistent with Justice Kennedy's statement in *Lamie* that federal courts cannot "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Lamie*, 540 U.S. at 538, 124 S. Ct. 1023 (quoting *Mobil Oil*, 436 U.S. at 625, 98 S. Ct. 2010). In *United States v. Ivy*, 929 F.2d 147 (5th Cir. 1991) the Fifth Circuit, citing the Third Circuit's opinion in *Rosenberg*, "refuse[d] to judicially append the relation element to § 844(h)(2)." *Id.* at 151.

The *Rosenberg* decision was written twenty years ago. Since then, Congress has not amended § 844(h)(2) to add a relational element. Under our constitutional

doctrine of the separation of powers, we cannot usurp Congress' authority.

III

The majority has refused to follow the Third Circuit's decision in *Rosenberg,* and the Fifth Circuit's opinion in *Ivy,* that we lack the authority to add an "in relation to" element to § 844(h)(2). Instead, the majority asserts that it is "constrained" to apply this Court's opinion in *United States v. Stewart,* 779 F.2d 538 (9th Cir. 1985), *overruled in part on other grounds by United States v. Hernandez,* 80 F.3d 1253, 1257 (9th Cir. 1996), which read a relational element into 18 U.S.C. § 924(c). The term "constrain" is defined as "to force by stricture, restriction, or limitation imposed by nature, oneself, or circumstances and exigencies." Webster's Third New International Dictionary 489 (1976). I do not agree with my colleagues that we are forced, by the law of this Circuit, to follow *Stewart* in construing the words expressly and unambiguously set forth by Congress in a separate statute.

> [A] three-judge panel may not overrule a prior decision of the court. That proposition is unassailable so far as it goes, but it does not take into account the possibility that our prior decision may have been undercut by higher authority to such an extent that it has been effectively overruled by such higher authority and hence is no longer binding on district judges and three-judge panels of this court. . . . We hold that the issues decided by the higher court need not be identical in order to be controlling. Rather, the relevant court of last resort must have undercut the theory or reasoning underlying the

> prior circuit precedent in such a way that the cases are clearly irreconcilable.

Miller v. Gammie, 335 F.3d 889, 899-900 (9th Cir. 2003) (en banc).

More recently, in *Ortega-Mendez v. Gonzales*, 450 F.3d 1010 (9th Cir. 2006), Judge Berzon pointed out that "[w]e are 'bound not only by the holdings of [such intervening] decisions but also by their mode of analysis.'" *Id.* at 1019. (quoting *Gill v. Stern (In re Stern)*, 345 F.3d 1036, 1043 (9th Cir. 2003)). (internal quotations omitted).

In *Stewart*, a three-judge panel of this Court determined that it had the authority to add an element to a criminal statute that was unambiguous by referring to legislative history. We stated: "We interpret [§ 924(c)] as if it contained the requirement that the firearm be possessed 'during and in relation to' the underlying offense." 779 F.2d at 540. The Supreme Court's subsequent holding in *Lamie* that, where the language is plain, we cannot "read an absent word into the statute," 540 U.S. at 538, 124 S. Ct. 1023, undercuts our conclusion in *Stewart* that we had the authority to add a relational element to § 924(c). Accordingly, we are constrained to apply the holding and mode of analysis set forth in *Lamie* and enforce § 844(h)(2) "according to its terms" and not to "rewrit[e] rules that Congress has affirmatively and specifically enacted." *Lamie*, 540 U.S. at 538, 124 S. Ct. 1023.

I would affirm the District Court's judgment of conviction with respect to Count 9 by employing the following logical syllogism.

Section 844(h)(2) provides that "[whoever . . . carries an explosive during the commission of any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years."

It is undisputed that Mr. Ressam was carrying explosives in the trunk of his car when he falsely stated in a Customs Declaration Form # 6059B that his name was Benni Noris in violation of 18 U.S.C. § 1001.

Therefore, Mr. Ressam is subject to the enhanced punishment prescribed in § 844(h)(2) because he was carrying an explosive during the commission of the crime set forth in § 1001.

APPENDIX B

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT
Western District of Washington, Seattle

Nos. 05-30422, 05-30441
D.C. No. CR-99-00666-001-JCC

UNITED STATES OF AMERICA,
PLAINTIFF-APPELLANT-CROSS-APPELLEE

v.

AHMED RESSAM, ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT-APPELLEE-
CROSS-APPELLANT

Filed: June 6, 2007

ORDER

Before: ARTHUR L. ALARCÓN, PAMELA ANN RYMER, and MARSHA S. BERZON, Circuit Judges.

Order;

Dissent by Judge O'SCANNLAIN

A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Alarcón would grant the peti-

tion for rehearing and accept the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc. A judge of the court requested a vote on whether to rehear the matter en banc. However, the matter failed to receive a majority of votes of the nonrecused active judges in favor of en banc consideration. Fed. R. App. P. 35.

The petition for rehearing is **DENIED** and the suggestion for rehearing en banc is **REJECTED**.

O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KLEINFELD, GOULD, BYBEE, CALLAHAN and BEA, Circuit Judges:

With all due respect to my colleagues, this high-profile case, involving an individual trained in Afghanistan by al-Qaeda and convicted of conspiring to detonate explosives at Los Angeles International Airport as part of a terrorist attack, is an ideal candidate for rehearing en banc. In *United States v. Ressam*, 474 F.3d 597 (9th Cir. 2007), a panel majority concluded that a conviction under 18 U.S.C. § 844(h)(2) requires that explosives be carried not only *during* a felony, as the statute says, but also *in relation to* that felony, which the statute does not say. The panel thus reversed one count of conviction of "Millenium Bomber" Ahmed Ressam. I dissent from the denial of rehearing en banc because *United States v. Stewart*, 779 F.2d 538, 539-40 (9th Cir. 1985), the two-decade old decision of our court upon which the panel relied, does not compel the result reached, and, further, by extending *Stewart* and reading the "in relation to" language into § 844(h)(2), we have not only usurped the congressional function, but have also created a split of authority with every other United States

Court of Appeals that has addressed this question. *See* Fed. R. App. P. 35(b)(1)(B).

I

The facts and circumstances surrounding al-Qaeda trainee Ahmed Ressam's plot to detonate explosives at Los Angeles International Airport and his capture as he entered the United States are well-detailed in the panel opinion. *Ressam*, 474 F.3d at 599-601. In brief, Ressam and an associate loaded the trunk of a rental car with explosives, electronic timing devices, detonators, fertilizer, and aluminum sulfate, and drove to a ferry terminal at Twassen, British Columbia. *Id.* at 600. Ressam drove the rental car aboard the ferry, which later that day docked in Port Angeles, Washington. When Ressam attempted to drive his car off, a customs inspector stopped him for inspection. *Id.* After the customs officer became suspicious and subjected Ressam's vehicle to a more intrusive search, inspectors discovered some of the bomb's component parts. Once the car and all its contents were inventoried and tested, authorities realized that Ressam had all the materials for a full scale terrorist attack. *Id.* Ressam was indicted and convicted on nine counts, including one count of carrying an explosive during the commission of a felony, in violation of 18 U.S.C. § 844(h)(2). *Id.* at 600-01.

II

The critical legal issue in this appeal is whether Ressam's conviction for carrying an explosive during the commission of a felony must be reversed because the government did not also prove that Ressam was carrying the explosives *in relation to* the underlying felony (the "relational element"), which in this case the government designated as making a false statement in a

customs declaration. *See* 18 U.S.C. § 844(h) ("Whoever . . . carries an explosive during the commission of any felony which may be prosecuted in a court of the United States . . . shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years.").

The panel reasoned that our decision in *Stewart*, 779 F.2d at 539-40 compelled it to conclude that 18 U.S.C. § 844(h)(2) contains a relational element. I respectfully disagree. Then-Judge Kennedy's majority opinion in *Stewart* construed 18 U.S.C. § 924(c), which made unlawful the carrying of a firearm during the commission of a felony. At the time of Mr. Stewart's conviction, § 924(c) did not include an explicit relational element. *See Stewart*, 779 F.2d at 539. But by the time his case reached our court on appeal, "Congress [had] revised section 924(c), combining former subsections 924(c)(1) and 924(c)(2). The 1984 amendment substituted for the word 'during' the phrase 'during and in relation to.'" *Id.*

In determining whether the jury was properly instructed at Mr. Stewart's trial, our court focused almost entirely upon the legislative history of the 1984 amendment. The court's reading of the legislative history "indicate[d] the 'in relation to' language was not intended to create an element of the crime that did not previously exist, but rather was intended to make clear a condition already implicit in the statute." *Id.* Thus, it concluded, because the relational element existed at the time of Stewart's trial, his jury instruction was in error.

But critically, there is no similar legislative history as to § 844(h)(2) because Congress never amended that

statute to include the language that it added to § 924(c).[1] As the Third Circuit reasoned in reaching a conflicting conclusion than that of our *Ressam* panel, "even if the *Stewart* court was correct in its analysis of why Congress amended § 924(c), Congress has not seen fit to modify § 844(h) in the same manner." *United States v. Rosenberg,* 806 F.2d 1169, 1178 (3d Cir. 1986).

Indeed, it is telling that when Congress did amend § 844(h)(2) in 1988, it did *not* add the relational language. At that time, Congress had before it our circuit's decision in *Stewart,* 779 F.2d at 539-40, and the Third Circuit's decision in *Rosenberg,* 806 F.2d at 1179. *Rosenberg* had rejected *Stewart's* general reasoning and its reasoning as specifically applied to § 844(h)(2), instead relying upon the plain, unambiguous language of that section. With these divergent decisions before it, Congress chose in 1988 not to add the "in relation to" language to § 844(h)(2). As the Supreme Court has explained, "where Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion." *Russello v. United States,* 464 U.S. 16, 23 (1983). This presumption of a knowing and intentional Congress in my view compels us to recognize that we are not "constrained" by *Stewart*'s reasoning in deciding the proper interpretation of § 844(h)(2).

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[1] It should go without saying that this may have been a deliberate omission. The carrying of an explosive during the commission of a crime greatly increases the risk of injury or death to others, more so than even a firearm. Plus, it is more likely in the case of explosives than firearms that the "weapon" may go off accidentally. In short, as a policy matter, Congress may have had good reasons for not amending § 844(h)(2) as it amended the firearms statute.

III

But even were the panel constrained by *Stewart*, I think it appropriate to rehear this case en banc because our holding that § 844(h)(2) includes a relational element is in conflict with every other circuit which has had occasion to consider the question. *See Rosenberg*, 806 F.2d at 1178; *United States v. Ivy*, 929 F.2d 147 (5th Cir. 1991); *United States v. Jenkins*, 2005 WL 3440416, **3-5 (6th Cir. 2005) (unpublished).[2]

The main thrust of our sister circuits' decisions is that the plain language of § 844(h)(2) says nothing about a relational element, but only requires carrying the explosives *during* the commission of a felony. As *Rosenberg* stated:

> Section 844(h)(2) by its terms only requires that the government show that the defendant unlawfully carried an explosive "during the commission of any felony." The plain everyday meaning of "during" is "at the same time" or "at a point in the course of." *See*, Webster's Third New International Dictionary 703 (1961). It does not normally mean "at the same time and in connection with. . . ." It is not fitting for this court to declare that the crime defined by § 844(h)(2) has more elements than those enumerated on the face of the statute. If Congress sees fit to add a relational element to § 844(h)(2), it is certainly free to

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[2] The government also contends that the Eighth Circuit's decision in *United States v. King*, 230 F.3d 1364 (8th Cir. 2000) (unpublished), conflicts with *Ressam*, but I think *King*'s reasoning too difficult to follow and too conclusory to give it much weight.

> do so, in the same manner that it added a relational element to § 924(c).

806 F.2d at 1178-79.

Further, as the Supreme Court more recently explained, when interpreting a statute "[w]ith a plain, nonabsurd meaning in view," we should not undertake to add missing words or elements, or to soften the impact of Congress' enactments. *Lamie v. United States Trustee,* 540 U.S. 526, 538 (2004). According to the Court, "[o]ur unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding. It results from 'deference to the supremacy of the Legislature, as well as recognition that Congressmen typically vote on the language of a bill.'" *Id.* (quoting *United States v. Locke,* 471 U.S. 84, 95 (1985) (internal citations omitted)). As Judge Alarcón stated in his dissent, "Mr. Ressam's proposed instruction would have required the District Court to add an element to § 844(h)(2) that does not appear in the statute enacted by Congress." *Ressam,* 474 F.3d at 606 (Alarcón, J., dissenting in part). It remains to be seen how, in practice, this additional requirement will impact the ability of prosecutors in this circuit to obtain convictions in explosives and terrorism cases. But in my view, *Lamie* confirms that the wisdom of such additions are firmly left to the determination of the legislative branch.

The reasoning and restraint of *Lamie* and of our sister circuits' decisions stand in stark contrast to *Stewart* and the panel decision in *Ressam.*[3] The great ad

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[3] I think it is reasonable to question the validity of *Stewart*' s reasoning even though the statute has been amended to include the rela-

vantage of rehearing this appeal before our en banc court is that we could decide the proper interpretation of § 844(h)(2) and overrule *Stewart*, even if it is true that decision has left our circuit with something less than a "clean slate." *Ressam*, 474 F.3d at 602.

IV

Regardless of whether *Stewart* was correctly decided, I would quite simply not allow that decision to control the outcome of this case without en banc review. Because the panel's decision to vacate "Millennium Bomber" Ahmed Ressam's conviction under 18 U.S.C. § 844(h)(2) is in square conflict with the reasoning of our sister circuits and with the cautionary pronouncements of the Supreme Court, we should have reheard this case en banc. I respectfully dissent from the court's decision otherwise.

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tional element. The reliance in that opinion upon the legislative history of an amendment to determine the scope of the pre-amendment statute is questionable. *See United States v. Price*, 361 U.S. 304, 313, 80 S. Ct. 326, 4 L. Ed. 2d 334 (1960) ("[T]he views of a subsequent Congress form a hazardous basis for inferring the intent of an earlier one."). And other courts have not read the legislative history relied upon by *Stewart* to be so clear. *See Rosenberg*, 806 F.2d at 1178 ("[W]e do not find that the legislative history to the 1984 amendment 'strongly implied' that the 'in relation to' language did not affect the scope of the statute as originally drafted. At most, we find that the legislative history fails to explain why the 'in relation to' phrase was added to the statute."); *see also Stewart*, 779 F.2d at 540 (noting that the legislative history upon which it relied was "sparse" and "not entirely free of ambiguity").

APPENDIX C

1. 18 U.S.C. 844(h) and (j) (2000) provides:

Penalties

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried.

* * * * *

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section and section 842(p), the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials,

fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

* * * * *

2. 18 U.S.C. 844(h) (1982) provides:

Penalties

* * * * *

(h) Whoever—

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive unlawfully during the commission of any felony which may be prosecuted in a court of the United States.

shall be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of the second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than twenty-five years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

* * * * *

3. 18 U.S.C. 924(c)(1) (2000) provides:

Penalties

(C)(1)(A) Except to the extent that a greater minimum sentence is otherwise provided by this subsection or by any other provision of law, any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm, shall, in addition to the punishment provided for such crime of violence or drug trafficking crime—

(i) be sentenced to a term of imprisonment of not less than 5 years;

(ii) if the firearm is brandished, be sentenced to a term of imprisonment of not less than 7 years; and

(iii) if the firearm is discharged, be sentenced to a term of imprisonment of not less than 10 years.

(B) If the firearm possessed by a person convicted of a violation of this subsection—

(i) is a short-barreled rifle, short-barreled shotgun, or semiautomatic assault weapon, the person shall be sentenced to a term of imprisonment of not less than 10 years; or

(ii) is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler,

the person shall be sentenced to a term of imprisonment of not less than 30 years.

(C) In the case of a second or subsequent conviction under this subsection, the person shall—

(i) be sentenced to a term of imprisonment of not less than 25 years; and

(ii) if the firearm involved is a machinegun or a destructive device, or is equipped with a firearm silencer or firearm muffler, be sentenced to imprisonment for life.

(D) Notwithstanding any other provision of law—

(i) a court shall not place on probation any person convicted of a violation of this subsection; and

(ii) no term of imprisonment imposed on a person under this subsection shall run concurrently with any other terms of imprisonment imposed on the person, including any term of imprisonment imposed for the crime of violence or drug trafficking crime during which the firearm was used, carried, or possessed.

* * * * *

4. 18 U.S.C. 924(c) (1982) provides:

Penalties

* * * * *

(c) Whoever—

(1) uses a firearm to commit any felony for which he may be prosecuted in a court of the United States, or

(2) carries a firearm unlawfully during the commission of any felony for which he may be prosecuted in a court of the United States,

shall, in addition to the punishment provided for the commission of such felony, be sentenced to a term of imprisonment for not less than one year nor more than ten years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than two nor more than twenty-five years and, notwithstanding any other provision of law, the court shall not suspend the sentence in the case of a second or subsequent conviction of such person or give him a probationary sentence, nor shall the term of imprisonment imposed under this subsection run concurrently with any term of imprisonment imposed for the commission of such felony.

* * * * *

OPPOSITION BRIEF

No. 07-455

FILED
NOV - 5 2007
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

AHMED RESSAM,

Respondent.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

BRIEF IN OPPOSITION

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QUESTION PRESENTED

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." The question presented is whether Section 844(h)(2) requires that the explosives be carried "in relation to" the underlying felony.

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STATEMENT

The government prematurely presses for further review of this case, before even imposition of a final sentence, to resolve a conflict between the circuits twenty years in the making that is of no importance to the sentence in this case or to the prosecution and punishment of other terrorism cases. The question presented is purely academic and certiorari should be denied.

1. The original sentencing centered on two themes: (1) the seriousness of Mr. Ressam's criminal activity and (2) his significant post-conviction cooperation. The seriousness of the misconduct is self-evident and was accurately detailed in the opinion of the court of appeals. Pet. App. 3a-6a. Mr. Ressam's cooperation extended over an eighteen-month period and involved scores of debriefings by law enforcement personnel and prosecutors from throughout North America and Europe. He identified dozens of terrorists, described the composition and function of terrorist cells, detailed the location and membership of particular cells, provided information about the recruitment and training of terrorists, described the financing of terrorist operations, and revealed methods used to conceal identities of terrorists. He provided this intelligence during a critical point in history, both before and after the September 11th attacks. His information was distributed to law enforcement agencies throughout the world.

2. At sentencing, both parties recommended sentences significantly below the sixty-five-year low end of the guideline range as calculated by the probation department. The probation department's calculations were disputed by the defense, C.A. E.R. 555-563, but in the end, were of little importance in light of the government's recommendation of thirty-five years, C.A. E.R. 572, and the defense recommendation of "substantially lower" than twenty years. C.A. E.R. 547. While the sentencing judge did not, given the positions of the parties, express an opinion as to the appropriate guideline range, he did explain he had done his "best to arrive at a period of confinement that appropriately recognizes the severity of the intended offense," the "cooperation of Mr. Ressam, even though it did terminate prematurely," and the importance of notice to others that they "should be prepared to sacrifice a major portion of their life in confinement" should they violate the law of this country. C.A. E.R. 856. He imposed a twenty-two-year term of imprisonment. C.A. E.R. 855.

3. The government appealed the sentence after which Mr. Ressam filed a cross-appeal challenging his conviction on Count 9, which charged a violation of 18 U.S.C. § 844(h)(2). The court of appeals vacated that conviction and remanded the case for resentencing because of its decision on Count 9 and, "[e]ven more significantly," because "the law applicable to sentencing is in flux." Pet. App. 13a. It reasoned that "the district court should have the initial opportunity to impose a sentence consistent with evolving law." Pet.

App. 14a. In the end, the sentence, not the survival of the Section 844(h)(2) conviction, will mark the importance of this case.

REASONS FOR DENYING THE WRIT

I. THE QUESTION PRESENTED IS OF NO PRACTICAL IMPORTANCE.

A. This Case

Resolution of the question presented is not important to this case, and certainly need not be resolved now, before the resentencing ordered by the court of appeals. Under the unique circumstances of this case, the presence or absence of a conviction on Count 9 will not affect the sentence the district court imposes.

1. This Court typically awaits final judgment before exercising certiorari jurisdiction. *See Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R. Co.*, 389 U.S. 327, 328 (1967) (*per curiam*); *Virginia Military Inst. v. United States*, 508 U.S. 946 (1993) (opinion of Scalia, J., respecting denial of petition for a writ of certiorari). Here, the court of appeals remanded the case for resentencing, so there is not yet a final judgment. Pet. App. 14a; *Burton v. Stewart*, 127 S. Ct. 793, 798 (2007) (*per curiam*). The lack of finality "alone [is] sufficient ground for the denial of the application." *Hamilton-Brown Shoe Co. v. Wolf Bros. Co.*, 240 U.S. 251, 258 (1916). Interlocutory review is discouraged "unless it

is necessary to prevent extraordinary inconvenience and embarrassment in the conduct of the cause." *American Const. Co. v. Jacksonville, T. & K. W. Ry. Co.*, 148 U.S. 372, 384 (1893). Indeed, for more than two decades the Solicitor General has consistently argued for denial of certiorari in federal criminal cases until rendition of final judgment. *See* Robert L. Stern, et al., *Supreme Court Practice* § 4.18, at 258 n.59 (8th ed. 2002). Awaiting final judgment risks no prejudice, inconvenience, embarrassment or miscarriage of justice.

2. Resolution of the question presented will not affect the sentence in this case. Petitioner offers no argument as to how the demise of Count 9 might influence the final outcome. The record supports that Mr. Ressam's sentence will not be affected by the absence of a conviction on Count 9. This was an unusual case where even the government's sentencing recommendation of thirty-five years fell well below the sixty-five-year low end of the government's interpretation of the guideline sentencing range. C.A. E.R. 572. It is hard to imagine the government will lower its recommended sentence should it now calculate the low end of the guideline range to be fifty-five years. For the district court, this was a case that involved balancing the severity of the terrorism offense with Mr. Ressam's cooperation and the need for general deterrence. The district court stated: "[T]his sentencing is one that I have struggled with a great deal, more than any other sentencing that I've had in the 24 years I've been on the bench." C.A. E.R.

856. The district court's struggle was over the full circumstances of the case, not the particulars of the charges contained in the indictment. This was made clear when the court directed allocation of the penalty "according to the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years." C.A. E.R. 855. The sentencing judge's focus was on the total punishment, not the counts of conviction. The same is true of the government's recommendation.

Upon remand, the remaining eight counts of conviction carry statutory maxima in excess of 100 years imprisonment. Absent Count 9, the district court retains considerable discretion to impose a sentence that reflects the severity of Mr. Ressam's offenses, the extent of his cooperation, and the need for deterrence. The ultimate outcome in this case, while not certain, will not be influenced by the court of appeals' decision to vacate the conviction on Count 9. Because Count 9 has no independent significance, interlocutory appeal is unwarranted.

3. Finally, the only sense in which the question presented "matters in this case," Pet. Cert. 9; Pet. App. 7a, is the product of a charging mistake. When charging Mr. Ressam with violating Section 844(h)(2), the government specifically and exclusively selected as the predicate felony the charge of "making a false statement to a U.S. Customs Inspector." C.A. E.R. 13. Because it is undisputed there was no evidence at trial showing that the explosives facilitated or played a role in the crime of lying on

the customs declaration, it matters in this case, as it was charged, whether the statute requires a relationship between the carrying of explosives and the predicate felony. The question, however, would not have arisen had the government linked the Section 844 violation with the allegation of a conspiracy to commit an act of terrorism (Count 1). There was ample evidence produced at trial that the explosives in Mr. Ressam's trunk aided the conspiracy to commit an act of terrorism. Petitioner's question arises and matters in this case not because of the facts of the case but because of the way in which the government chose to charge it.

B. Other Cases

The government's argument as to the importance of the question presented for review is tellingly short and acknowledges that Section 844(h)(2) "is not a frequently used provision," and, when used, "it may be that in many cases the government will be able to establish that the carrying of explosives 'facilitated or played a role in' the underlying offense." Pet. Cert. 20 (internal citation omitted). These observations are correct and themselves diminish the importance of the question presented. The government attempts to inflate the significance of the question presented by asserting that the issue "is increasingly important in terrorism prosecutions" and that properly construing the statute assists "the government's ability to obtain an appropriate sentence" in terrorism cases. Pet.

Cert. 13. But these are naked assertions, unsupported by reference to a single past or ongoing case. The government offers only hypothetical and unlikely situations where a problem might emerge. Pet. Cert. 21. Review of the handful of actual cases in the post-9/11 era that involved convictions under Section 844(h)(2) demonstrates that petitioner's concern is unfounded.

1. The Department of Justice reports that in the five years between September 11, 2001, and August 31, 2006, a total of 288 people were convicted or pleaded guilty in terrorism or terrorism-related cases. Fact Sheet: Department of Justice Anti-Terrorism Efforts Since Sept. 11, 2001 (Sept. 5, 2006).[1] Petitioner does not claim that its interpretation of Section 844(h)(2) was instrumental in any one of those cases. Indeed, a review of the convictions in terrorism cases that included a conviction or guilty plea on a Section 844(h)(2) offense reveals that in every one of those cases there was a relationship between the carrying of explosives and the alleged predicate felony.[2] For

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[1] http://www.usdoj.gov/opa/pr/2006/September/06_opa_590.html (last visited Nov. 1, 2007).

[2] Absent any specific illustrations from the government, Respondent requested information on Section 844(h) convictions from the Administrative Office of the United States Courts. Respondent reviewed that information and determined that in the period from October 1, 1999, through September 30, 2006, there were eleven convictions or guilty pleas involving a violation of Section 844(h)(2), including Mr. Ressam's case. Seven of those cases were terrorism or terrorism-related cases.

example, in *United States v. Mohamed Rashed Daoud Al-'Owhali,* No. 98-01023 (S.D.N.Y), the government charged that the defendants "used and carried bombs in connection with the attacks on the United States embassies in Nairobi, Kenya and Dar es Salaam, Tanzania." Seventh Superseding Indictment (on file with Respondent). In *United States v. Al-Timimi,* No. 04-00385 (E.D. Va.), a government press release notes that Al-Timimi was convicted of "counseling others to use firearms and explosives in furtherance of crimes of violence." Press Release, U.S. Department of Justice (April 26, 2005).[3] In *United States v. Randall Royer and Ibrahim Al-Hamdi,* No. 03-00296 (E.D. Va.), the government asserted that one defendant carried, and the other aided the carrying of, explosives "in furtherance of a conspiracy to undertake a military operation against India." Press Release, U.S. Department of Justice, *Two Defendants in Virginia Jihad Case Plead Guilty to Weapons Charges, Will Cooperate With Ongoing Investigation* (Jan. 16, 2004).[4] A relationship between Section 844(h)(2) and the underlying felony regularly appears in terrorism prosecutions and, as suggested by the government, is not difficult to establish. Pet. Cert. 20. This being so, the government's contention that the question

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[3] http://www.usdoj.gov/usao/vae/Pressreleases/04-AprilPDFArchive/05/42605TimimiPR.pdf (last visited Nov. 1, 2007).

[4] http://www.usdoj.gov/opa/pr/2004/January/04_crm_030.htm (last visited Nov. 1, 2007).

presented is important to the successful prosecution of terrorism cases is not well taken.

2. The government's professed concern that in hypothetical cases in the future its interpretation of the statute will be important in obtaining lengthy sentences in terrorism cases, Pet. Cert. 13, 21, is similarly unrealistic. In federal prosecutions involving the illegal use or possession of explosives, the government has available an arsenal of serious charges with lengthy penalties. This case is illustrative. In addition to the Section 844(h)(2) violation listed in Count 9, Mr. Ressam was charged with and convicted of placing explosives in proximity to a terminal (Count 2), with a maximum sentence of twenty years; smuggling explosives into the United States (Count 6), with a maximum sentence of twenty years; transporting explosives without a permit (Count 7), with a maximum sentence of ten years; and possessing an unregistered explosive device (Count 8), with a maximum sentence of ten years. Even absent a conviction on the Section 844(h)(2) count, the remaining counts of conviction, including explosives and non-explosives counts, leave more than 100 years of potential punishment. The spawn of explosives-related charges and penalties was effectively used in this case and would be available in many circumstances, further diminishing petitioner's assertion of the importance of the decision of the court of appeals on district court sentencing decisions.

The infrequency of Section 844(h)(2) prosecutions, the consistent appearance of a relationship to

the underlying felony in Section 844(h)(2) in terrorism prosecutions brought to date, the array of additional explosives-related charges that might be filed in a terrorism case, and the unusual – and unlikely to be repeated – charging mistake in this case combine to deflate petitioner's hypothetical concern as to the potential effect of the court of appeals' decision on future terrorism prosecutions and punishments.

II. THIS CASE DOES NOT PRESENT AN IMPORTANT CONFLICT.

In support of the petition, the government relies on the disagreement between the circuit courts regarding the question presented in this case.[5] While a conflict may provide a basis for granting a writ, review is not automatic and review is properly denied when the conflict does not implicate an "important matter." Sup. Ct. R. 10(a). A disagreement between a limited number of lower courts that took over twenty years to arise, and the resolution of which will not affect this case or others, is not a conflict implicating an important matter.

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[5] As noted by the government, the Fifth Circuit in *United States v. Ivy*, 929 F.2d 147 (5th Cir. 1991), endorsed the holding in *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir. 1986), the decision in conflict with the decision in this matter. Because that endorsement was not essential to the holding in *Ivy*, the language construing Section 844(h)(2) "is best regarded as dicta," Resp. C.A. Op. Br. 17 n.4, or "an alternative holding." Pet. App. 7a. Whether on point or not, *Ivy* is best viewed as illustrative of how infrequent and therefore, unimportant, the conflict is.

1. How frequently an issue arises is significant in determining whether it is important enough to merit review. *See, e.g., Massachusetts Trustees of Eastern Gas and Fuel Assocs. v. United States*, 377 U.S. 235, 237 (1964); *see also* Stern, *Supreme Court Practice*, § 4.4 at 228 ("the important and recurring nature of the issue in conflict often plays a decisive role in the grant or denial of certiorari"). Here, the government acknowledges that Section 844(h)(2) "is not a frequently used provision." Pet. Cert. 20. It was not until twenty years after the Third Circuit's decision in *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir. 1986), that the Ninth Circuit addressed this issue of "first impression" and reached a different result.

2. The importance of this limited and recent disagreement between the circuits is further lessened by the interlocutory posture of this case. Even where a circuit split exists, interlocutory review is disfavored absent a showing that (a) review is "fundamental to the further conduct of the case," *United States v. General Motors Corp.*, 323 U.S. 373, 377 (1945), or (b) the issue implicates important rights. *See Lauro Lines s.r.l. v. Chasser*, 490 U.S. 495, 502 (1989) (Scalia, J., concurring) ("The importance of the right asserted has always been a significant part of our collateral order doctrine."). As discussed above, resolution of the case is of no practical consequence to this case or others.

This disagreement identified by the government, which took twenty years to arise, does not involve an important matter. If, as the government alleges, that

changes in the future and the conflict does impact a particular case, this Court can resolve the disagreement at that time.

III. THE NINTH CIRCUIT'S DECISION IS CONSISTENT WITH THIS COURT'S JURISPRUDENCE.

The Ninth Circuit correctly concluded that Section 844(h)(2) "requires a relationship between the underlying crime and the act of carrying an explosive." Pet. App. 2a. This conclusion, that Congress did not impose a mandatory consecutive ten-year sentence for the coincidental carrying of an explosive while committing an unrelated felony, is supported by this Court's jurisprudence on statutory interpretation.

1. "Over and over" this Court has held that plain-meaning analysis of a statute "'must not be guided by a single sentence or member of a sentence, but look to the provisions of the whole law, and to its object and policy.'" *U.S. Nat'l Bank of Oregon v. Indep. Ins. Agents of America, Inc.*, 508 U.S. 439, 455 (1993) (quoting *United States v. Heirs of Boisdore*, 49 U.S. (8 How.) 113, 122 (1849)); *see also Dolan v. U.S. Postal Service*, 546 U.S. 481, 486 (2006) ("Interpretation of a word or phrase depends upon reading the whole statutory text, considering the purpose and context of the statute, and consulting any precedents or authorities that inform the analysis."). An examination of the statute as a whole compels the

conclusion that the government must prove a relationship between the carrying of explosives and the charged felony to trigger the imposition of a mandatory ten-year sentence. 18 U.S.C. § 844(h)(1) imposes a mandatory consecutive ten-year sentence for the *use* of explosives to commit a felony. Under the government's proposed interpretation of the statute, Subsection (h)(2) would impose an identically harsh penalty for the coincidental carrying of an explosive. Identical punishment for such different offenses makes no sense.

2. When interpreting a statute, the Court must choose "'a sensible construction' that avoids attributing to the legislature either 'an unjust or an absurd conclusion.'" *United States v. Granderson*, 511 U.S. 39, 56 (1994) (quoting *In re Chapman*, 166 U.S. 661, 667 (1897)). *See also Clinton v. City of New York*, 524 U.S. 417, 429 (1998) (expanding the word "individual" in 2 U.S.C. § 692(a)(1) to include corporations and other entities to avoid "an absurd and unjust result which Congress could not have intended") (quoting *Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 574 (1982)).

The government's proposed interpretation of Section 844(h)(2) could in many instances lead to absurd results. This is particularly true in light of the statute's broad definition of "explosives" in 18 U.S.C. § 844(j), which has been interpreted to include among other things, the gunpowder in ammunition inside a loaded handgun. *See United States v. Davis*, 202 F.3d 212, 219 (4th Cir. 2000). For example, absent a

relational element, a mandatory, consecutive ten-year sentence would be imposed on a police officer who, while lawfully carrying a loaded handgun, accepts a bribe, unrelated to his possession of a handgun.

That the government's interpretation of Section 844(h)(2) would lead to absurd results was specifically noted by one member of the Ninth Circuit panel who asked the government at oral argument:

Court: If, for example, Mr. Ressam was a licensed dynamite practitioner driving across the border in order to go to a construction site or a mine in Washington and use his dynamite and in the meanwhile he happened to be carrying something else that he didn't want the Customs to know about like, you know, diamonds, and they asked him what did he have and he said nothing, he would have violated the statute as you construe it.

Government: That's correct, Your Honor. And it would certainly be –

Court: What's the logic of that?

Government: Your Honor it would be, I would suggest that under that extremely unusual scenario, that it would be up to the government to decide whether it would choose to indict under those facts –

Media Access, United States Court of Appeals for the Ninth Circuit, Oral Arguments, *United States v. Ressam*, No. 05-30422 (Nov. 13, 2006).[6]

3. The rule of lenity provides further support for the Ninth Circuit's conclusion. "The Court has often stated that when there are two rational readings of a criminal statute, one harsher than the other, we are to choose the harsher only when Congress has spoken in clear and definite language." *McNally v. United States*, 483 U.S. 350, 359-60 (1987), *superseded by statute on other grounds*, Anti-Drug Abuse Act of 1988, Pub. L. No. 100-690, § 7603, 102 Stat. 4181. *See also Granderson*, 511 U.S. at 154 ("In these circumstances – where text, structure, and history fail to establish that the Government's position is unambiguously correct – we apply the rule of lenity and resolve the ambiguity in [the defendant's] favor."). As discussed above, it is perfectly rational to interpret the statute as requiring the government prove a relationship between the carrying of the explosives and the charged penalty before a mandatory consecutive ten-year sentence is applied.

4. Finally, as fully discussed in the Ninth Circuit's opinion, the legislative history supports the conclusion that Section 844(h)(2) includes a relational element. Pet. App. 9a-11a.

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[6] http://www.ca9.uscourts.gov/ca9/media.nsf/Media+Search?OpenForm&Seq=1 (last visited Nov. 1, 2007).

CONCLUSION

The petition for a writ of certiorari should be denied.

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November 5, 2007

REPLY BRIEF

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No. 07-455

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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REPLY BRIEF FOR THE UNITED STATES

In this case, the Ninth Circuit added to the offense of "carr[ying] an explosive during the commission of any [federal] felony," 18 U.S.C. 844(h)(2), a non-textual requirement that the government must establish that the explosives were carried "in relation to" the underlying felony. Pet. App. 2a. Respondent concedes that this decision conflicts with the holding of another circuit, but seeks to minimize the conflict's importance, while defending the Ninth Circuit's decision on the merits and urging that the interlocutory posture of this case makes certiorari inappropriate. None of those contentions has merit. As the government explained in its petition for a writ of certiorari, the court of appeals' decision squarely conflicts with published decisions from two other courts of appeals. The decision also conflicts with basic principles of statutory construction. And if it is allowed to stand, the Ninth Circuit's decision could significantly diminish Section 844(h)(2)'s usefulness as a tool in combating certain terrorism-related offenses, including the one at issue here, in the Nation's largest circuit. Accordingly, this Court's review is warranted.

A. The Conflict Among The Courts Of Appeals Merits This Court's Review

Respondent concedes (Br. in Opp. 10 n.5) that the Ninth Circuit's decision in this case conflicts with the Third Circuit's decision in *United States* v. *Rosenberg*, 806 F.2d 1169 (1986), cert. denied, 481 U.S. 1070 (1987). Respondent asserts (Br. in Opp. 10 n.5) that the Fifth Circuit's express rejection of a relational element in *United States* v. *Ivy*, 929 F.2d 147, cert. denied, 502 U.S. 883 (1991), "was not essential to the holding in *Ivy*." Re-

spondent offers no response, however, to the petition's explanation (Pet. 11-12) of why the *Ivy* court's conclusion that "Section 844(h)(2) * * * does not include the relation element Ivy urges," 929 F.2d at 151, was essential to the Fifth Circuit's judgment in that case.

Respondent contends (Br. in Opp. 10) that this acknowledged conflict is not "important" because it "took over twenty years to arise." But the fact that it took decades for any court of appeals to construe Section 844(h)(2) in a way that directly conflicts with its plain language says more about the incorrectness of the Ninth Circuit's decision than the importance of the issue going forward. That is particularly true in light of the court of appeals decisions in cases in which it appears that the relational element would not have been satisfied, but an objection does not appear even to have been raised. See, *e.g.*, cases cited, p. 4, *infra*. And given the Ninth Circuit's size and location, as well as the presence of numerous major cities and ports of entry within its borders, a square conflict between it and two other courts of appeal over the proper interpretation of an important terrorism-related statute clearly merits this Court's attention.

Respondent asserts (Br. in Opp. 7-8) that the Ninth Circuit's ruling in this case would not have interfered with the prosecution of other terrorism cases. Under the court of appeals' decision, however, the one indictment that respondent quotes was at least arguably defective, because alleging that explosives were carried "in connection with" another felony (*id.* at 8 (citation omitted)) is not the same thing as saying that the explosives "facilitated" (Pet. App. 12a (citation omitted)) or "aided the commission of" that felony (*id.* at 13a). See *ibid.* (concluding that "[i]t is not enough for the government to prove that [respondent] lied *because* he was smug-

gling explosives in the trunk of his car"). Nor did the charging documents in the other two cases respondent cites allege that the explosives were carried "in relation to" the underlying felony. See Superseding Indictment at 16, *United States* v. *Al-Timini*, No. 1-04-cr-00385-LMB (E.D. Va. filed Feb. 3, 2005) (charging defendant with "the carrying of explosives * * * during the commission of felonies which may be prosecuted in a court of the United States, including the conspiracy alleged in Count 1 of this indictment"); Criminal Information at 2, *United States* v. *Royer*, No. 1:03-cr-00296-LMB-1 (E.D. Va. filed Jan. 16, 2004) (charging defendant with "the carrying of an explosive * * * during the commission of a felony which may be prosecuted in a court of the United States, to wit, the conspiracy charged in Count One of the Indictment against the defendant in Criminal No. 03-296-A"); see also Information at 1, *United States* v. *Lindh*, 227 F. Supp. 2d 565 (E.D. Va. 2002) (No. 1:02-cr-00037-TSE) (charging that the defendant "did knowingly carry an explosive during the commission of a felony which may be prosecuted in a court of the United States, namely, Supplying Services to the Taliban"). Although respondent asserts (Br. in Opp. 7) that "in every one of these cases there was a relationship between the carrying of explosives and the alleged predicate felony," it is one thing for *respondent* to concede that fact and quite another for the government to establish such a relationship beyond a reasonable doubt where the defendant on trial in the particular case contests it. In any event, the possibility of proving the Ninth Circuit's "relational" element does not detract from the proposition (Pet. 21) that the government's burden should be limited to proving the elements specified by Congress.

The conflict is significant outside the terrorism context as well. As Judge O'Scannlain observed in dissenting from the denial of rehearing en banc, the Ninth Circuit's decision in this case directly conflicts with an unpublished Sixth Circuit decision from 2005. Pet. App. 29a (citing *United States* v. *Jenkins*, 229 Fed. Appx. 362, 365-367 (2005), cert. denied, 126 S. Ct. 2022 (2006)). In *Jenkins*, the Sixth Circuit stated that "the plain language of [Section 844(h)(2)] does not require a relational element" and that the Third Circuit's decision in *Rosenberg* "correctly interpret[s] the statute." 229 Fed. Appx. at 367. The underlying felony charged in *Jenkins* was interstate transport of a stolen motor vehicle, see *id.* at 365, and it is far from clear that the carrying of explosives "facilitate[d]" (Pet. App. 2a) the commission of that felony. The same is true of two other recent Section 844(h)(2) cases that were brought in the First and Eighth Circuits. See *United States* v. *Colón Osorio*, 360 F.3d 48, 50 (1st Cir. 2004) (underlying felonies were possession of a firearm after having been convicted of a felony and possession of a firearm with an obliterated serial number); *United States* v. *King*, No. 99-3449, 2000 WL 1277815, at *1 (8th Cir. Sept. 11, 2000) (per curiam) (underlying felony was possession of a firearm with an obliterated serial number), cert denied, 531 U.S. 1101 (2001).

B. The Court Of Appeals' Decision Incorrectly Constricts The Scope Of 18 U.S.C. 844(h)(2)

Respondent is correct (Br. in Opp. 12-13) that statutory construction requires consideration of the full statutory context. But respondent offers no answer to the petition's explanation of how the "context" provided by the contrast between Section 844(h)(1) and (2) (Pet. 14-

15), and the presence of an express relational requirement in 18 U.S.C. 924(c)(1)(A) (Pet. 17-19), only underscores what is apparent from the text of Section 844(h)(2) itself (Pet. 14-15): namely, that Congress did not intend for Section 844(h)(2) to contain an unstated relational element. In fact, respondent offers no theory whatsoever for how the court of appeals' decision is consistent with any of the pertinent statutory text or context.

Respondent also repeats the Ninth Circuit's claim that "the legislative history supports the conclusion that Section 844(h)(2) includes a relational element." Br. in Opp. 15 (citing Pet. App. 9a-11a). Respondent makes no effort, however, to rebut the petition's showing (Pet. 17-18) that the manner in which Sections 844(h)(2) and 924(c) have evolved confirms that the omission of a relational element from Section 844(h)(2) reflects a deliberate congressional choice.

Respondent suggests (Br. in Opp. 13) that imposing "an identically harsh penalty" in cases involving actual use of explosives and those involving "coincidental carrying" of them "makes no sense." But it is Congress that "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme," and courts "do not sit as a 'superlegislature' to second-guess these policy choices." *Ewing* v. *California*, 538 U.S. 11, 28 (2003) (opinion of O'Connor, J.). Congress's decision to omit a relational element in Section 844(h)(2) may reflect only a desire not to saddle the government with an additional element of proof once it has shown the carrying of explosives concomitant with the commission of a federal felony. Nor is it clear that the punishments for use and carrying offenses will invariably be the same. While a first offense under Sec-

tion 844(h)(2) for carrying an explosive requires a ten-year sentence, a person who uses or attempts to use an explosive to "damage or destroy" federal property, 18 U.S.C. 844(f)(1) (Supp. V. 2005), or any real or personal property "used in * * * any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i), is subject to at least five and up to 20 years of imprisonment, with the ranges being increased to seven to 40 years of imprisonment if a person is injured, and to 20 years to life imprisonment or the death penalty if a person is killed.

Respondent also invokes the prospect (Br. in Opp. 13-15) of a police officer being prosecuted under Section 844(h)(2) for accepting a bribe while carrying his loaded service revolver, or a licensed explosives dealer being prosecuted for possessing explosives during an entirely unrelated customs offense. Such examples are obviously far afield from respondent's own conduct, and it is telling that respondent is unable to identify any actual prosecution that resembles the hypothetical ones he posits.[1]

Finally, respondent's reliance (Br. in Opp. 15) on the rule of lenity is misplaced. The rule is a "maxim of statutory construction," *Taylor* v. *United States*, 495 U.S. 575, 596 (1990), and it applies only if there is such a "grievous ambiguity" in a statute that, "after seizing everything from which aid can be derived, [the Court]

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[1] *United States* v. *Davis*, 202 F.3d 212 (4th Cir.), cert. denied, 530 U.S. 1236 (2000) (Br. in Opp. 13), did not involve a prosecution under Section 844(h)(2). Rather, that case involved the calculation of the proper base offense level under the Sentencing Guidelines for a defendant who had been convicted, *inter alia*, of maliciously damaging a dwelling within the special maritime or territorial jurisdiction of the United States. See *id.* at 214, 218-219; 18 U.S.C. 1363. Although the Fourth Circuit referred to the definition of "explosive" contained in Section 844(j), it did so only because the Guidelines themselves contained no definition of that term. *Davis*, 202 F.3d at 218.

can make no more than a guess as to what Congress intended." *Muscarello* v. *United States*, 524 U.S. 125, 138-139 (1998) (internal quotation marks and citations omitted). There is no ambiguity here, and supplying an element that Congress itself omitted goes well beyond the doctrine's limited role.

C. This Court's Review Is Warranted

Respondent identifies three case-specific reasons for denying review. None has merit.

1. Respondent asserts (Br. in Opp. 3-4) that this Court should deny certiorari because the court of appeals remanded for resentencing. While many criminal cases in an interlocutory posture ordinarily do not warrant this Court's review, this case exemplifies the situation in which review at this time is justified. The need for a remand was created by the reversal of respondent's conviction on Count 9, see Pet. App. 13a, the very issue on which the government seeks review.[2] The Court has in other cases granted the government's petition for a writ of certiorari in federal criminal cases where a court of appeals has remanded for further proceedings, but where a controlling legal issue that will govern further proceedings warrants the Court's attention. See, *e.g.*, *United States* v. *Gonzalez-Lopez*, 399

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[2] The government also sought resentencing in its appeal, Pet. App. 7a, but the court of appeals declined to reach the merits of the government's contention, both because of its reversal on the Section 844(h)(2) count and because "the law applicable to sentencing is in flux." *Id.* at 13a. The court of appeals left it to the district court's discretion whether to defer sentencing until after this Court or the Ninth Circuit en banc clarifies the applicable law. *Id.* at 14a. No proceedings have occurred in the district court because on June 17, 2007, the Ninth Circuit granted the government's motion to stay its mandate pending this Court's disposition of this petition for a writ of certiorari.

F.3d 924, 935 (8th Cir. 2005) (remanding for new trial), cert. granted, No. 05-352 (Jan. 6, 2006), aff'd, 126 S. Ct. 2557 (2006); *United States* v. *Grubbs*, 377 F.3d 1072, 1080 (9th Cir. 2004) (remanding to permit withdrawal of conditional guilty plea), cert. granted, No. 04-1414 (Sept. 27, 2005), rev'd, 547 U.S. 90 (2006); *United States* v. *Booker*, 375 F.3d 508, 514 (7th Cir. 2004) (remanding for resentencing), cert. granted, No. 04-104 (Aug. 2, 2004), aff'd, 543 U.S. 220 (2005); *United States* v. *Putra*, 78 F.3d 1386, 1390 (9th Cir. 1996) (same), cert. granted and rev'd *sub nom. United States* v. *Watts*, 519 U.S. 148 (1997) (per curiam); *United States* v. *Gonzales*, 65 F.3d 814, 823 (10th Cir. 1995) (same), cert. granted, No. 95-1605 (June 17, 1996), vacated, 520 U.S. 1 (1997). The Court has also at times granted certiorari over the government's opposition in cases in a similar posture. See *United States* v. *Begay*, 470 F.3d 964 (10th Cir. 2006) (remanding for resentencing under *Booker* while affirming applicability of Armed Career Criminal Act), cert. granted, No. 06-11543 (Sept. 25, 2007); *United States* v. *Jones*, 993 F.2d 1131 (4th Cir. 1993) (remanding with directions to reinstate indictment), cert. granted, No. 93-445 (Nov. 15, 1993), aff'd *sub nom. Beechum* v. *United States*, 511 U.S. 368 (1994).

Here, the proper disposition of the Section 844(h)(2) count will have an independent impact on respondent's sentence and that impact will not be affected by further proceedings on remand. See pp. 8-9, *infra*. Accordingly, the question presented is "fundamental to the further conduct of the case," *United States* v. *General Motors Corp.*, 323 U.S. 373, 377 (1945), and this Court's review is warranted at this time.

2. Respondent also contends (Br. in Opp. 5) that "Count 9 has no independent significance," because

"[t]he sentencing judge's focus was on the total punishment, not the counts of conviction." Section 844(h), however, expressly declares that the mandatory ten-year term of imprisonment may not be "suspend[ed]" or "run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried." 18 U.S.C. 844(h). Because Congress mandated that a sentence on a Section 844(h)(2) count must be served entirely independently of a defendant's sentences on all other counts, a district court may not properly modify the sentences on the other counts simply because a defendant must, as a matter of express congressional directive, serve a mandatory ten-year sentence for violating Section 844(h)(2). See *United States* v. *Hatcher*, 501 F.3d 931, 933-934 (8th Cir. 2007) (holding that sentences on other counts must be imposed "independently" of the mandatory consecutive term of imprisonment required for violations of Section 924(c)); *United States* v. *Franklin*, 499 F.3d 578, 583 (6th Cir. 2007) (same); *United States* v. *Roberson*, 474 F.3d 432, 434 (7th Cir. 2007) (Posner, J.) ("[T]he judge should have picked a sentence for the bank robbery without regard for the fact that a gun had been used in it, and then tacked on 84 months," *i.e.*, the seven-year term of imprisonment mandated by Section 924(c)(1)(A)(ii).). Accordingly, the validity or invalidity of respondent's conviction for violating Section 844(h)(2) is, as a matter of law, highly significant to the determination of the total appropriate punishment in this case; the judge may not simply select what he believes to be the total sentence warranted and then allocate that sentence over all of the counts if one of those counts arises under Section 844(h)(2).

3. Finally, respondent argues (Br. in Opp. 5-6) that this case involves only "a charging mistake" because the government could have "linked the Section 844 violation with the allegation of a conspiracy to commit an act of terrorism" charged in Count 1. But "what charge[s] to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979); see *United States* v. *Hayward*, 6 F.3d 1241, 1247 n.7 (7th Cir. 1993) ("The government has discretion in how it charges people alleged to have committed federal crimes."), cert. denied, 511 U.S. 1004 (1994). Thus, although there was indeed "ample evidence" (Br. in Opp. 6) that respondent carried an explosive during and in relation to a conspiracy to commit an act of international terrorism, the government is not required to take on the burden of proving more than Congress required in order to obtain a conviction for a factually supported charge. For the same reason, it does not matter (*id.* at 9) that there are a variety of other federal offenses that provide "lengthy penalties" for "the illegal use or possession of explosives"; Congress provided a mandatory penalty for this one, and it did not require proof of a relational element before that penalty may be imposed.

* * * * *

For the foregoing reasons, and those stated in the petition for a writ of certiorari, the petition for a writ of certiorari should be granted.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

NOVEMBER 2007

JOINT APPENDIX

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79 pgs

No. 07-455

FILED
JAN 22 2008
OFFICE OF THE CLERK
SUPREME COURT, U.S.

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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PETITION FOR A WRIT OF CERTIORARI FILED: OCT. 4, 2007
CERTIORARI GRANTED: DEC. 7, 2007

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 05-30422

UNITED STATES OF AMERICA, PLAINTIFF-APPELLANT

v.

AHMED RESSAM, ALSO KNOWN AS BENNI ANTOINE NORIS,
DEFENDANT-APPELLEE

DOCKET ENTRIES

DATE	PROCEEDINGS
8/29/05	DOCKETED CAUSE AND ENTERED APPEARANCES OF COUNSEL. Filed in D.C. on 8/26/05; setting schedule as follows: transcript shall be ordered by 9/16/05 for USA; transcript shall be filed by 10/17/05; appellants' briefs, exerpts due by 11/28/05 for USA; appellees' brief due 12/28/05 for Ahmed Ressam; appellants' reply brief due by 1/11/06 for USA. (RT required: YES) (Sentence imp 22 years) [05-30422] (Kym) [05-30422]
12/13/05	Filed original and 15 copies of Ahmed Ressam's first brief on cross-appeal (Informal: n) of 37 pages and 5 excerpts of

DATE	PROCEEDINGS
	record in 5 volumes; served on as 12/12/05 [05-30422, 05-30441] (ba) [05-30422 05-30441]
	* * * * *
2/23/06	Received original only of USA's 2nd cross-appeal brief (Informal: n) 80 pages and 1 supplemental excerpt of record in 1 volume: served 2/22/06 (Motion Pending PROMO - To File Oversized Brief) [05-30422, 05-30441] (ba) [05-30422 05-30441]
	* * * * *
4/3/06	Filed original and 15 copies of USA's second brief on cross-appeal (Informal: n) of 78 pages and 5 supplemental excerpts of record in 1 volume; served on 3/31/06 [05-30422, 05-30441] (ba) [05-30422 05-30441]
	* * * * *
7/5/06	Filed original and 15 copies of Ahmed Ressam's third brief on cross-appeal (Informal: n) of 50 pages; served on 7/3/06 [05-30422, 05-30441] (ba) [05-30422 05-30441]
	* * * * *
8/17/06	Filed original and 15 copies of USA's cross appeal reply brief (Informal: n) of 22 pages; served on 8/16/06 [05-30422, 05-30441] (ba) [05-30422 05-30441]

DATE	PROCEEDINGS
	* * * * *
9/27/06	CALENDARED: Seattle Nov 13 2006 9:00 a.m. Courtroom at Park Place, 21st Floor [05-30422, 05-30441] (th) [05-30422 05-03441]
	* * * * *
11/13/06	ARGUED AND SUBMITTED TO Arthur L. ALARCON, Pamela A. RYMER, Marsha S. BERZON. [05-30422, 05-30441] (sb) [05-30422 05-30441]
	* * * * *
1/16/07	FILED OPINION: REVERSED IN PART; VACATED IN PART and REMANDED: (Terminated on the Merits after Oral Hearing; Reversed; Written, Signed, Published. Arthur L. ALARCON, concurring; Pamela A. RYMER, author; Marsha S. BERZON.) FILED AND ENTERED JUDGMENT. [05-30422, 05-30441] (ba) [05-30422 05-30441]
	* * * * *
3/2/07	[6106666] Filed original and 50 copies of USA's petition for rehearing with suggestions for rehearing en banc, 20 p.pages, served on 3/1/07 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [05-30422, 05-3441] (ba) [05-30422 05-30441]

DATE	PROCEEDINGS
3/12/07	Filed order (Arthur L. ALARCON, Pamela A. RYMER, Marsha S. BERZON): Appellee is hereby directed to file a response to appellant's Petition for Rehearing with suggestion for Rehearing En Banc. The response shall not exceed 10 pages. An original and 50 copies shall be filed on or before close of business (5:00 p.m.) 3/26/07. (Phoned csl @ 3:00 pm) [05-30422, 05-30441] (mj) [05-30422 05-30441]
3/23/07	Filed Ahmed Ressam's response to Government's Petition for Rehearing and Suggestion for Rehearing En Banc, 9 p.pages; served on 3/23/07 (PANEL AND ALL ACTIVE JUDGES AND ANY INTERESTED SENIOR JUDGES) [05-30422, 05-30441] (ba) [05-30422 05-30441]
6/6/07	Filed order (Arthur L. ALARCON, Pamela A. RYMER, Marsha S. BERZON,): A majority of the panel has voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc. Judge Alarcon would grant the petition for rehearing and accept the suggestion for rehearing en banc. The petition for rehearing is DENIED and

DATE	PROCEEDINGS
	the suggestion for rehearing en banc is REJECTED. O'SCANNLAIN, Circuit Judge, dissenting from the denial of rehearing en banc, joined by KLEINFELD, GOULD, BYBEE, CALLAHAN and BEA, Circuit Judges: (SEE ORDER FOR FULL DISSENT) [05-30422, 05-30441] (ba) [05-30422 05-30441]
	* * * * *
6/14/07	Filed order (Arthur L. ALARCON, Pamela A. RYMER, Marsha S. BERZON,): Appellant's Motion for Stay of the Mandate Pending the Filing of a Petition For A Writ of Certiorari in the United States Supreme Court is GRANTED. Pursuant to FRAP 41(d)(B), the mandate in the case is stayed for ninety (90) days to permit the appellant to file a petition for writ of certiorari in the Supreme Court. Should Court grant certiorari, the mandate will be stayed pending its disposition of the case. Shoudl [*sic*] the Supreme Court deny certiorari, the mandate will issue immediately. The parties shall advise the court immediately upon the Supreme Court's decision. In 05-30422, 05-30441 [05-30422, 05-30441] (ba) [05-30422 05-30441]

DATE	PROCEEDINGS
6/25/07	Filed order (Arthur L. ALARCON, Pamela A. RYMER, Marsha S. BERZON,): The order denying the Petition for Rehearing with Suggestion for Rehearing En Banc and dissent filed on 6/6/07, are designated for publication. [05-30422, 05-30441] (ba) [05-30422 05-30441]
8/27/07	Received letter from the Supreme Court dated 08/27/07 re: extension of time to file writ of cert extented until 10/04/07. [05-30422, 05-30441] (dv) [05-30422 05-30441]
10/11/07	Received notice from Supreme Court: petition for certiorari filed Supreme Court No. 07-455 filed on 10/4/07. (Panel) [05-30422, 05-30441] (ba) [05-30422 05-30441]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
(SEATTLE)

Criminal Docket for Case 2:99-cr-00666-JCC

UNITED STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM ALSO KNOWN AS
BENNI ANTOINE NORIS, DEFENDANT

DOCKET ENTRIES

DATE	DOCKET NUMBER	PROCEEDINGS
12/17/1999	1	COMPLAINT Magistrate Judge David E. Wilson [2:99-m -547] (HAZ) (Entered: 12/20/1999)
12/17/1999	2	MOTION to detain by USA asto Ahmed Ressam [2:99-m -547] (HAZ) (Entered: 12/20/1999)

* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
12/22/1999	8	INDICTMENT by USA Andrew R. Hamilton. Counts filed against Ahmed Ressam (1) count(s) 1, 2, 3, 4, 5 (MH) (Entered: 12/22/1999)
12/22/1999	9	DETENTION ORDER of Ahmed Ressam pending Trial by Magistrate Judge John L. Weinberg (cc: counsel, Mag. Judge, PTS, Jgm. Bk., USMO) (MH) (Entered: 12/23/1999)
	* * * * *	
12/22/1999	13	MINUTES of Arraignment: JLW, Dep Clerk JN, AUSA Kate Pflaumer and Francis J. Diskin, Def Counsel Thomas Hillier and Michael Filipovic, CR Caroline Castle, Intpr Rajaa Gharbi (Arabic) Dft present in custody of USMO dft Ahmed Ressam arraigned; NOT GUILTY plea entered; Attorney present;,; pretrial motions due 1/12/00 for Ahmed Ressam; jury trial scheduled 9:30 2/22/00 for Ahmed Ressam (JN) (Entered: 12/28/1999)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
01/20/2000	20	SUPERSEDING indictment Ahmed REssam (1) count(s) 1s, 2s, 3s, 4s, 5s, 6s, 7s, 8s, 9s, Abdelmajid Dahoumane (2) count(s) 1, 2 (RS) (Entered: 01/21/2000)
		* * * * *
1/27/2000	34	MINUTES of ARRAIGNMENT - Dft RESSAM (on Superseding Indictment): DEW, Dep Clerk PV, AUSA J. Diskin, S. Gonzalez, A. Hamilton, Def Counsel T. Hillier, J. Oliver, M. Filipovic, CR/Tape # L. Kelly, Intpr Rajaa Gharbi (Arabic); Dft Pleads NOT GUILTY; jury trial is set for 9:00 2/28/00 for Ahmed Ressam; pretrial motions are due by 2/10/00 for Ahmed Ressam (SL) (Entered: 01/28/2000)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
02/14/2001	178	SUPERSEDING indictment Ahmed Ressam (1) count(s) 1ss, 2ss, 3ss, 4ss, 5ss, 6ss, 7ss, 8ss, 9ss, Abdelmajid Dahoumane (2) count(s) 1s, 2s, 6, 7s (MH) (Entered: 02/15/2001)
		* * * * *
03/07/2001	206	TRIAL MEMORANDUM submitted by defendant Ahmed Ressam (VB) (Entered: 03/08/2001)
		* * * * *
03/12/2001	226	MINUTES of TRIAL-DAY 1-DFT RESSAM: JCC, Dep Clerk Debra O'Neill, AUSA Hamilton/Diskin/Gonzales [*sic*], Def Counsel Landin/Oliver/Hillier/Filipovi, CR Laura Elias, Intpr Nabila Rizk, Fawzi Halaka (Arabic); jury is impaneled and sworn; jury trial is continued to 9:00 3/13/01 for Ahmed Ressam (MH) Modified on 03/14/2001 (Entered: 03/14/2001)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
03/16/2001	237	JURY INSTRUCTIONS by defendant Ahmed Ressam (MH) (Entered: 03/16/2001)
	* * * * *	
03/20/2001	249	RESPONSE by plaintiff USA re: jury instructions [237-1] (MH) (Entered: 03/22/2001)
03/20/2001	250	REQUESTED JURY INSTRUCTIONS by plaintiff USA (MH) (Entered: 03/22/2001)
	* * * * *	
04/02/2001	279	RESPONSE by defendant Ahmed Ressam to government's proposed jury instructions [250-1] (VB) [Entered: 04/04/2001]
04/03/2001	283	MINUTES of 16th DAY JURY TRIAL - DFT. RESSAM: JCC, Dep Clerk DO, AUSA Hamilton/Diskin/Gonzalez, Def Counsel Hillier/Oliver/Filipovic, CR Zaccaro/Elias, , Intpr Rizk/

DATE	DOCKET NUMBER	PROCEEDINGS
		Halaka (Arabic) & Maniquis (French) Witnesses called, sworn & testified; exhibits identified & admitted; Motion for judgment of acquittal counts 1,5,7,9: denied as to counts 1,5,9, submitted as to count 7; jury trial is continued to 9:00 4/4/01 for Ahmed Ressam (VB) (Entered: 04/05/2001)
		* * * * *
04/03/2001	288	MOTION for judgment of acquittal as to count 9 by defendant Ahmed Ressam (VB) (Entered: 04/05/2001)
04/03/2001		LODGED ORDER: granting motion for judgment of acquittal as to count 9 by defendant Ahmed Ressam [288-1] (VB) Entered: 04/05/2001)
04/05/2001	297	MINUTES of JURY TRIAL-DAY 18-DFT RESSAM: JCC, Dep Clerk Debra O'Neill, AUSA Hamilton/Diskin/ Gonzalez, Def Counsel

DATE	DOCKET NUMBER	PROCEEDINGS
		Hillier/Oliver/Filipovic, CR Zaccaro/Elias, Intpr Nabila Rizk/Fawzi Halaka (Arabic); closing arguments, jury retires to deliberate; deliberations will contine 9:00 4/6/01 for Ahmed Ressam (MH) (Entered: 04/20/2001)
		* * * * *
04/06/2001	298	MINUTES of JURY TRIAL-DAY 19-DFT RESSAM: JCC, Dep Clerk Debra O'Neill, AUSA Hamilton/Diskin, Def Counsel Oliver/Filipovic, CR Laura Elias, Intpr Nabila Rizk/Fawzi Halaka (Arabic); dft found GUILTY on counts 1-9; sentencing hearing is set for 9:00 6/28/01 for Ahmed Ressam (MH) (Entered: 04/20/2001)
04/06/2001	299	JURY INSTRUCTIONS (MH) (Entered: 04/20/2001)
		* * * * *

DATE	DOCKET NUMBER	PROCEEDINGS
02/19/2003	345	MOTION for a continuance of dft's sentencing proceedings by USA as to Ahmed Ressam NOTED FOR 2/28/03 (CL) (Entered: 02/20/2003)
02/20/2003	346	RESPONSE by defendant Ahmed Ressam to motion for a continuance of dft's sentencing proceedings by USA as to Ahmed Ressam [345-1] (FILED UNDER SEAL) (LS) (Entered: 01/21/2003)
02/26/2003	347	MOTION pursuant to U.S.S.G. Section 5K1.1 by USA as to Ahmed Ressam (CL) (Entered: 02/26/2003)
	* * * * *	
04/19/2005	365	SENTENCING MEMORANDUM and Motion to Depart from Sentencing Guidelines by Ahmed Ressam (Attachments: #1 Exhibit 1-34# 2 Exhibit 35-65# 3 Exhibit 66-102# 4 Exhibit 103-126# 5 Exhibit 127-137) (Hillier, Thomas) (Entered: 04/19/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
		* * * * *
04/20/2005	367	SENTENCING MEMORANDUM by United States of America as to Ahmed Ressam (Attachments: # 1 ~~Proposed Order~~ Agreement Letter) (Bartlett, Mark) ATTACHMENT IDENTIFIED INCORRECTLY SHOULD BE AGREEMENT LETTER. Modified on 04/20/ 2005 (VB,). (Entered: 04/20/ 2005)
		* * * * *
07/25/2005	379	MEMORANDUM *Defendant's Supplemental Sentencing Memorandum* by Ahmed Ressam (Hillier, Thomas) (Entered: 07/25/2005)
		* * * * *
07/26/2005	381	RESPONSE TO *RESSAM'S SUPPLEMENTAL SENTENCING MEMORANDUM* by United States of America as to Ahmed Ressam re 379 Memorandum filed by Ahmed Ressam, (Bartlett, Mark) (Entered: 07/26/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
07/27/2005	382	Minute Entry for proceedings held before Judge John C. Coughenour - CRD: *JM;* *AUSA: MCKAY, BARTLETT, BAKER;* Def Cnsl: *HILLIER, OLIVER, FILIPOVIC;* USPO: *COWAN;* Court Reporter: *JOE ROTH*; Interpreter: *WALID FARHOUD*; **SENTENCING** held on 7/27/2005 for Ahmed Ressam (1), 1, 1s, 2, 2s, 3, 3s, 4, 4s, 5, 5s, 6s, 7s, 8s, 9s, Dismissed; Count(s) 1ss, 84 months jail time, 60 month supervised release, fine waived, $900.00 penalty Assessment.; Count(s) 2ss, 3ss, 4ss, 5ss, 6ss, 7ss, 8ss, 60 months jail time, 60 months supervised release, fine waived, $900.00 penalty assessment; Count(s) 9ss, 120 months jail time, 60 months supervised release, fine waived, $900.00 penalty assessment. Defendant(s) remanded to custody. (LMS,) (Entered: 07/27/2005)

DATE	DOCKET NUMBER	PROCEEDINGS
07/27/2005	383	JUDGMENT as to Ahmed Ressam by Judge John C Coughenour. (cc: USPO, PTS, USMO, FLU, Fin.) (LMS,) (Entered: 07/27/2005)
	* * * * *	
08/26/2005	385	NOTICE OF APPEAL by United States of America as to Ahmed Ressam (McKay, John) (Entered: 08/26/2005)
	* * * * *	
09/01/2005	390	NOTICE OF APPEAL by Ahmed Ressam (Filipovic, Michael) (Entered: 09/01/2005)
	* * * * *	

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR99-0666JCC

UNITED STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, A/K/A BENNI NORIS, AND
ABDELMAJID DAHOUMANE, DEFENDANTS

[Filed: Feb. 14, 2001]

SECOND SUPERSEDING INDICTMENT

THE GRAND JURY CHARGES THAT:

COUNT 1

(An Act of Terrorism Transcending a National Boundary)

Beginning at a time unknown but during 1996, and continuing through on or about December 14, 1999, in Canada and within the Western District of Washington, involving conduct which transcended a national boundary and utilizing a facility of foreign commerce AHMED RESSAM, ABDELMAJID DAHOUMANE, and others known and unknown by the Grand Jury, knowingly created a substantial risk of serious bodily injury to another person, by conspiring to destroy or damage structures, conveyances or other real or personal property within the

United States in violation of the laws of the State of Washington, that is, Chapter 9A.48 and Section 9A.28.040 of the Revised Code of Washington.

The Grand Jury further charges that to effect the object of this conspiracy one or more of the defendants and co-conspirators took one or more substantial steps within the Western District of Washington, including, but not limited to, the following: 1. The offenses charged in Counts 2 and 5-9 of this Second Superseding indictment which are incorporated here in as if fully set forth herein; and 2. on December 14, 1999, in Port Angeles, Washington, AHMED RESSAM escaped from U.S. Customs officials and attempted to carjack a vehicle as he fled from U.S. Customs officials.

All in violation of Title 18, United States Code, Sections 2332b(a)(1)(B) and 2332b(c).

COUNT 2

(Placing an Explosive in Proximity to a Terminal)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM and ABDELMAJID DAHOUMANE, with reckless disregard for the safety of human life, willfully placed or caused to be placed an explosive or other destructive substance in proximity to a terminal, structure or facility used in the operation of, or in support of the operation of, motor vehicles engaged in interstate or foreign commerce.

All in violation of Title 18, United States Code, Sections 33 and 2.

COUNT 3

(False Identification Documents)

On or about December 14, 1999, at Victoria, British Columbia, Canada, in order to gain entry to Port Angeles, Washington, and continuing until his arrival in Port Angeles, Washington, within the Western District of Washington, AHMED RESSAM did knowingly possess a false and fraudulently obtained identification document with the intent that such document be used to defraud the United States.

All in violation of Title 18, United States Code, Section 1028(a)(4) and (b)(3)(B).

COUNT 4

(Use of a Fictitious Name for Admission)

On or about December 14, 1999, at Victoria, British Columbia, when applying for admission to the United States at Port Angeles, Washington, within the Western District of Washington, AHMED RESSAM knowingly did personate another and did evade or attempt to evade the immigration laws of the United States by appearing under an assumed and fictitious name without disclosing his true identity, in that AHMED RESSAM told a U.S. Immigration official he was Benni Noris, and presented a false and fraudulently obtained Canadian identification document in that name.

All in violation of Title 18, United States Code, Section 1546.

COUNT 5
(False Statement)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, in a matter within the jurisdiction of the United States Customs Service, an agency of the United States, AHMED RESSAM did knowingly and willfully make a false, fraudulent, and fictitious material statement and representation; in that the defendant presented to U.S. Customs inspectors a Customs Declarations Form #6059B identifying himself as Benni Noris, whereas in truth and fact, as he then well knew, this statement was false in that his true name is AHMED RESSAM.

All in violation of Title 18, United States Code, Section 1001.

COUNT 6
(Smuggling)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM and ABDELMAJID DAHOUMANE knowingly and fraudulently brought into the United States merchandise contrary to law, that is, hexamethylene triperoxide diamine, cyclotrimethylene trinitramine, and a nitroglycerin equivalent identified as ethylene glycol dinitrate.

All in violation of Title 18, United States Code, Section 545 and 2.

COUNT 7
(Transportation of Explosives)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM and ABDELMAJID DAHOUMANE, not being licensees

or permittees under the provisions of Chapter 40 of Title 18 of the United States Code, knowingly transported and shipped, and caused to be transported and shipped, in interstate and foreign commerce, from Canada into the United States, explosive materials, that is, hexamethylene triperoxide diamine, cyclotrimethylene trinitramine, and a nitroglycerine equivalent identified as ethylene glycol dinitrate.

All in violation of Title 18, United States Code, Sections 842(a)(3)(A), 844(a) and 2.

COUNT 8

(Possession of an Unregistered Destructive Device)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM knowingly possessed a firearm, that is, a destructive device as that term is defined in Title 26, United States Code, Section 5845(f), not registered to him in the National Firearms Registration and Transfer Record.

All in violation of Title 26, United States Code, Section 5841, 5861(d), and 5871.

COUNT 9

(Carrying an Explosive During the Commission of a Felony)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is, making a false statement to a U.S. Customs Inspector as charged in Count 5 herein.

All in violation of Title 18, United States Code, Section 844(h)(2).

A TRUE BILL:
DATED: Feb 14 2001

/s/ CYNTHIA J. [ILLEGIBLE]
CYNTHIA J. [ILLEGIBLE]
FOREPERSON

/s/ KATRINA C. PELAUMER
KATRINA C. PELAUMER
United States Attorney

/s/ FRANCIS J. DISKIN
FRANCIS J. DISKIN
Assistant United States Attorney

/s/ ANDREW R. HAMILTON
ANDREW R. HAMILTON
Assistant United States Attorney

/s/ STEVEN C. GONZALEZ
STEVEN C. GONZALEZ
Assistant United States Attorney

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

No. CR. 99-666 JCC

UNITED OF STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

Tuesday, Mar. 13, 2001

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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* * * * *

[111]

MR. GONZALEZ: Your Honor, our next witness would be Diana Dean.

MR. HAMILTON: I'm advised this witness is in the restroom but is momentarily due to come out.

DIANA DEAN, SWORN.

THE CLERK: Please take the stand.

Please state your full name and spell your last name for the record.

THE WITNESS: Diana Dean.

THE CLERK: Would you spell your last name.

THE WITNESS: D-e-a-n.

DIRECT EXAMINATION

BY MR. HAMILTON.

Q. Good afternoon.

A. Good afternoon.

Q. I am going to ask you to speak in the microphone. Will you pull that towards you?

A. Okay.

Q. Would you state your name.

A. Diana Dean.

Q. What is your occupation?

A. I'm a Customs Inspector.

Q. How long have you worked for that particular agency?

A. I started in 1980 in Hawaii.

Q. Where is your current duty position?

[112]

A. Port Angeles, Washington.

Q. Could you explain to the members of the jury what you do in your job as a Customs Inspector?

A. Yes. In addition to processing passengers off of the ferries that we have, we also have an airport and a seaport, and we have office duties, and that is about it.

Q. When you say you process cars what do you do?

A. When passengers arrive from the Coho Ferry from Victoria, we talk to them, find out who they are, where they are going and clear them into the United States.

Q. Now I am going to tell you I think your mic. is probably too close to you.

A. Okay.

Q. Were you working, Inspector Dean, on the afternoon of December 14th, 1999?

A. Yes, sir.

Q. What were you doing at the time the Coho Ferry came in?

A. I was waiting to work the car passengers. We have 3 lanes. I was in the center lane watching the cars come off the ferry.

Q. I am going to ask you to push the mic. a little bit away from you.

A. Okay.

Q. That whole thing moves. Push the whole arm away.

A. Okay.

[113]

Q. Inspector, would you like some water or anything?

A. If I could, please.

Q. There is no glass.

What time does the Coho Ferry ordinarily come into Port Angeles from Victoria?

A. Its scheduled arrival is at 5:30 in the afternoon that time of year. The particular night in question I believe it was probably there between 5:45 and 5:50.

Q. During that part of the year of the month of December how many ferries actually come across to Port Angeles?

A. At that time there is only one ferry a day.

Q. Does that schedule change during other parts of the year?

A. Yes, it does.

Q. In what way?

A. At the height of our summer tourist season we have 4 Coho Ferries a day, and we have 3 V.R.T. foot ferries a day, so we have up to 7 ferries a day.

Q. In December how many ferries?

A. Just the one.

Q. In a month like December, what is the average number of vehicles that come off the ferry?

A. The vehicles at that time of year are pretty light, probably somewhere between 2 to to 40 maybe.

Q. How long does it take you and your co-workers to [114] actually process a ferry?

A. At that time of year generally 15, 20 minutes.

Q. You said that you were working a car lane. When a car pulls up to you what do you do? What is your normal procedure?

A. I talk to the person, the people in the car, determine who they are, where they are going and send them on their way.

Q. Do you talk to everybody?

A. Yes.

Q. Can you explain what is meant by the term secondary inspection?

A. A secondary inspection would be what we do when we realize we can't process somebody quite quickly enough on primary. Maybe we need to ask a few more questions or look through the car. Then we refer them for a secondary inspection.

Q. What does that mean?

A. It means we take a little bit longer with them.

Q. Is the car physically moved?

A. This particular night it was not because he was the very last car on the ferry.

Q. Normally do you have an area for secondary inspection?

A. Normally yes, we do.

Q. What happens at secondary?

[115]

A. The person or persons in the vehicle are asked to step out, and we usually put them up in the front of the car for officer safety or maybe move them on to the porch of our trailer. We normally will have them take things out of their

pockets. We will look through their luggage, maybe look through the car, glove compartment, under the seats.

Q. Do you ever use drug dogs?

A. We don't have any of our own, but on occasion we have used the sheriff's dogs?

Q. I would like to specifically refer you to the December 14th unloading of the Coho Ferry.

A. Uh-huh.

Q. Do you recall the last car to depart from the ferry?

A. Yes, I do.

Q. Can you explain to the members of the jury what happened with this car?

A. Well, he has the last car off. I was working the center lane. He approached me, rolled down his window. I asked the individual where he was going, and he replied, "Sattal," and I said, "why are you going to Seattle?" And he replied, "visit," and I said, "where do you live?" And he said, "Montreal," and then I said, "who are you going to see in Seattle?" And he said, "no, hotel."

As he said that the became more—he was becoming more agitated, and as he said "hotel," he began to rummage [116] in the console of his car and both hands disappeared from sight, which we don't like to see that because, of course, we don't have any idea what might be in the car.

Q. Inspector, let me ask you a question. Did you detect any kind of accent from this person?

A. I did. When he said he was from Montreal I knew he had an accent. I thought it was French Canadian.

Q. What was this person's demeanor?

A. It became—as the questions went on, it became more—he became more nervous and agitated.

Q. Was this person alone in the car?

A. He was.

Q. What did you finally do?

A. I finally—

Q. Well, let me rephrase that. Did you ask him to fill out any paperwork?

A. Oh, I did. At this point when his hands disappeared from view, and he was becoming agitated I knew we were going to do a secondary examination on the car, and so I asked him—I mean, I gave him a customs declaration to fill out which is what we do for everybody that we are doing a secondary on. He began to fill the paperwork out.

Q. Let me stop you for a second. I wonder if you could look at what has been marked as Exhibit 8004. I am going to ask permission for Mr. Gonzalez to approach the witness.

[117]

Do you recognize that document?

A. Yes, I do.

Q. What is it?

A. This is a customs declaration that I gave him to fill out that night.

MR. HAMILTON: Your Honor, I would offer Exhibit 8004.

MR. FILIPOVIC: No objection, Your Honor.

THE COURT: It will be admitted.

(Exhibit 8004 received in evidence.)

MR. HAMILTON: May we show it to the jury on the television screen?

THE COURT: Yes.

BY MR. HAMILTON:

Q. Inspector Dean, what was the name that was filled out on this form?

A. The name is Benni Norris.

Q. Did the person indicated a country of citizenship?

A. Oh, country of citizenship is Canada.

Q. Did the person put down an address?

A. No, he did not.

Q. If you look to the right of Canada on item 7.

A. Oh, I'm sorry. Under country of residence?

Q. Right.

A. Yes. I can't really read it, but yes, there is an [118] address.

Q. Let me ask you does this declaration have a requirement that it be filled out under oath? Is there language on this form that says that?

A. I believe there is. It has been a long time since I have read this. I am not sure.

Q. If you look at the bottom of the form right above the signature, is there something that is printed on that?

A. Oh, yes, yes. It says, "I have read the notice on the reverse and have made a truthful declaration."

Q. Whose signature appears under that? Is that the person that was filling out the form?

A. That is the person that was filling out the form, correct.

Q. All right. On the form that you have in your hand and I guess I should first ask you what was the name the person wrote down on the form?

A. I can't read that.

Q. Can you read the last name or what is called family name on line 1?

A. On line 1 it is Norris, N O R IS .

Q. How about line 2?

A. Benni, B E N N I.

Q. On this form did Mr. Norris declare anything as far as items that he was bringing into the United States?

[119]

A. No, he did not.

Q. After Mr. Norris handed that form back to you what happened next?

A. At that point I had asked him—I took the form back and I asked him if he would turn off the car, pop open his trunk and step out of the car. It took a couple minutes to get him to comply with that, but he did eventually turnoff

the car, step out. He had popped open the trunk and two inspectors were standing behind the car. They had come back from processing foot passengers, and Inspector Mark Johnson was standing a little ways over, and I was standing right outside the passenger door.

Inspector Johnson took our passenger over to just look through his pockets and see what he had. The 2 inspectors that were at the back of the car—

Q. Let me stop you for a second if I can. Was this what you were describing as a secondary inspection?

A. Yes, sir.

Q. But you had not moved the car over into the secondary inspection lot?

A. That's correct.

Q. Why is that?

A. Well, he was right beside the secondary lot. He was under the light. He was under the cover. He was under the light. We had plenty of light there. There was really no [120] reason. There weren't any cars trying to get away from behind him, so there was no reason to move him.

* * * * *

[162] * * *.

THE COURT: All right. You may step down. Call you next witness.

MR. HAMILTON: Your Honor, we would call Mark Johnson. May this witness be excused?

THE COURT: Yes

MARK JOHNSON, SWORN.

THE CLERK: Please take the stand.

Please state you full name and spell your last name for the record.

THE WITNESS: Mark Johnson.

THE CLERK: Spell your last name.

THE WITNESS: J-O-H-N-S-O-N.

DIRECT EXAMINATION

BY MR. HAMILTON.

Q. Good afternoon.

A. Hi.

Q. Could you tell us what you occupation is?

A. I'm a U.S. Customs Inspector in Port Angeles.

Q. Port Angeles, Washington?

A. Yes.

Q. How long have you been employed by that particular agency?

A. With Customs since '91.

Q. Briefly can you explain the nature of your duties.

[163]

A. We inspect the people, goods of people that cross the border, and we will determine the legality of the things they are bringing across, and that in a nutshell is what we do.

Q. Why don't you take a deep breath.

A. Yes. Give me a minute.

Q. Were you working at the Port Angeles terminal on December 14th of 1999?

A. Yes, sir.

Q. As the cars came off the Coho Ferry what were you doing?

A. I was inspecting vehicles as well.

Q. What was your position in relation to Inspector Dean?

A. I would be just to the west of her in lane 3.

Q. Who finished with their particular lane first, you or Inspector Dean?

A. I did.

Q. After you finished your lane what happened next?

A. I walked towards our Customs Office and while Inspector Dean was still handling maybe one or two cars in her lane, and I went and stood midway between the office and where I was watching her finish because I stand as back up until everything was completed.

Q. Did there come a time when you went over to assist Inspector Dean with the last car from the ferry?

[164]

A. Yes, I did.

Q. Did you have contact with the driver of that vehicle?

A. Yes, I did.

Q. What happened when you had contact with him? What were the events of that?

A. I was handed an I.D. card.

Q. By who?

A. Mr. Ressam.

Q. Well, let me take care of 2 things at once.

A. Okay.

Q. The person you dealt with in that car, would you be able to recognize them if you saw them again?

A. Yes.

Q. Is that person present in court?

A. He is, sir.

Q. Will you identify him, please.

A. He is the fellow over there behind the computer terminal with it looks like a brownish sweater.

MR. HAMILTON: May the record reflect he has identified Mr. Ressam.

* * * * *

[174] * * *.

Q. What do you recall seeing in the trunk?

A. Four black boxes, several bags and the large olive jars of a clear liquid, amber colored, and some pill bottles.

MR. HAMILTON: Your Honor, I would ask permission to show the witness Exhibit 3-E which has already been admitted.

THE COURT: Very well.

MR. HAMILTON: Take a look at that photograph on the screen.

Q. Do you recognize that photo?

A. That is the trunk.

Q. Are these the bags that you saw?

A. Those are the bags.

Q. You indicated some glass jars. Are they depicted?

A. I can see the corner of one on the very left, and on the right he got a clear view of the other.

Q. If you look at the right side of the photo there is a couple of small items in the lower right corner. What are those?

A. Little pill bottles like tylenol bottles.

Q. Now you indicated you started to test the powder for the presence of drugs.

A. That I did.

[175]

Q. Is that what is called making a field test?

A. Yes.

Q. Can you explain to the jury what a field test is and how it words.

A. Okay. Whenever you come across an item that you suspect might be a narcotic you would take just a small sample of that, and you would have a little plastic envelope, thick plastic that has chemicals in it. It has a glass—

chemicals, a glass vial. When you smash it a chemical comes out and it mixes in with the stuff that you have, and if there is any sign of a narcotic it will turn a color, and we have a guide showing which narcotics turns to a certain color.

Q. What did you filed test?

A. The white powder from the bags.

Q. Was there any reaction?

A. There was none. I tested for opiates, methamphetamine, cocaine, and nothing was happening.

Q. Now during this field testing process, did you test the contents of the pill bottles?

A. I did not.

Q. What, if anything, did you do with the pill bottle?

A. I just kind of looked at them and shook them around.

Q. Did you know that the pill bottles contained a high explosive?

[176]

A. I know that now.

Q. Did you know it at the time?

A. I did not.

Q. What, if anything, did you do with safeway olive jar containers that had the brown liquid?

A. I tipped them upside-down for the viscosity of it.

Q. Did you know at the time it contained the equivalent of nitroglycerin?

A. I did not know.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CASE NO. CR 99-666-JCC

UNITED OF STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, AKA BENNI NORRIS, DEFENDANT

Tuesday, Mar. 20, 2001

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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* * * * *

[46]

DIRECT EXAMINATION

BY MR. HAMILTON:

Q. Again for the regard would you state your name and your occupation.

A. Frederick W. Humphries, the second. My last name is spelled H-u-m-p-h-r-i-e-s. I'm a special agent for the Federal Bureau of Investigation.

* * * * *

[117]

* * * * *

Q. Do you have 3084 in front of you?

A. Yes, I do.

Q. What is that?

A. 3084 I need to look at the photograph that is with it. It is 2084. It is a British Columbia Ferry Corporation sale receipt from Tsawwassen to Swartz Bay.

Q. The receipt is for how many individuals?

A. It is for 2 adults and one undersized vehicle.

Q. Does the document reflect how it was purchased?

A. Yes, it does. There is visa card 4510130000663617 in the amount of $37.75 dated 14 December 1999.

MR. HAMILTON: I would offer 3084 and 2084

MR. FILIPOVIC: No objection.

THE COURT: Admitted

(Exhibits 2084 and 3084 received in evidence.)

[118]

MR. HAMILTON: May I approach the witness?

THE COURT: Yes.

MR. HAMILTON: I would like to ask permission to publish 2084 to the jury.

Q. Is this the ferry receipt that you were talking about?

A. Yes, it is.

Q. And you have already indicated a visa number that was used to purchase this ticket.

A. Yes.

Q. It that the number—the visa card number that has been use numerous times in the past by Benni Noris?

A. Yes, it is.

Q. Can you indicate which route this particular ferry run is for?

A. Yes, it is.

Q. Can you indicate which route this particular ferry run is for?

A. It is for Tsawwassen to Swartz Bay, Tsawwassen being lower mainland British Columbia; Swartz Bay being a point on Vancouver Island.

* * * * *

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON

No. CR99-666C

UNITED STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

[Filed: Mar. 8, 2001]

DEFENDANT'S TRIAL MEMORANDUM

COMES NOW the defendant, Ahmed Ressam, by his attorneys, Federal Public Defender Thomas W. Hillier, II, Assistant Federal Public Defender Michael Filipovic and Assistant Federal Public Defender Jo Ann Oliver, and hereby submits the following trial memorandum for the Court's consideration.

* * * * *

Count 9

Count 9 alleges:

(Carrying an Explosive During the Commission of a Felony)

On or about December 14, 1999, at Port Angeles, within the Western District of Washington, AHMED RESSAM

knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is, making a false statement to a U.S. Customs Inspector as charged in Count 5 herein.

All in violation of Title 18, United States Code, Section 844(h)(2).

Defendant's proposed instruction No. 28 requires that the government prove that the defendant carried explosives "during and in relation to" the false statement charge alleged in Count 5. The phrase "in relation to the crime" is further defined in the proposed instruction as requiring the explosive to facilitate or play a role in the false statements crime alleged in Count 5.

The instructional issue presented is whether a prosecution under 18 U.S.C. § 844(h)(2) requires a causal connection between the explosive and the underlying felony as has been traditionally required for firearms prosecutions under 18 U.S.C. § 924(c).

1. **Relevant Principles of Statutory Interpretation**

The purpose of statutory interpretation is to ascertain the intent of Congress in enacting a particular statute. *United States v. Daas*, 198 F.3d 1167, 1174 (9th Cir. 1999). The first step in determining congressional intent is to look at the plain language of the statute. *Id.* This requires more than viewing certain words in isolation; "[t]o determine the plain meaning of a particular statutory provision, and thus congressional intent, the court looks to the entire statutory scheme." *Id.* (citation omitted).

The meaning of words must be drawn from context and this requires reading relevant statutory provisions as a whole. *See United States v. Hanousek*, 176 F.3d 1116, 1120

(9th Cir.), *cert. denied*, 528 U.S. 1102 (2000); *Carpenters Health and Welfare Trust Funds v. Robertson*, 53 F.3d 1064, 1067 (9th Cir. 1995); *see also Deal v. United States*, 508 U.S. 129, 132 (1993) ("the meaning of a word cannot be determined in isolation, but must be drawn from the context in which it is used"); *United States v. Bahe*, 201 F.3d 1124, 1130 (9th Cir.), *cert. denied*, 121 S. Ct. 601 (2000) ("[T]he meaning of statutory language, plain or not, depends on context.'") (*quoting Holloway v. United States*, 526 U.S. 1, 6 (1999)); *Mills v. Taylor*, 967 F.2d 1397, 1400 n.3 (9th Cir. 1992) ("each part or section should be construed in connection with every other part or section so as to produce a harmonious whole"), overruled on other grounds, *Reno v. Koray*, 515 U.S. 50 (1995).

2. **18 U.S.C. § 844(h)(2), When Viewed in its Statutory Context, Must Be Interpreted to Include Causal Connection as a Necessary Element of the Offense**

a. Statutory Language.

Subsection (h) of Title 18 U.S.C., section 844 provides in pertinent part as follows: (h) Whoever—

> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States, including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. . . .[8]

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[8] For the purposes of subsection (h), the term "explosive" is broadly defined as follows:

The statutory language—its prohibition against carrying explosives "during the commission of' a federal felony—explicitly and clearly connects the carrying of illegal explosives to the perpetration of some other felonious act.

b. The History, Context and Purpose.

Subsection (h) of section 844 was enacted as part of the Organized Crime Control Act of 1970. Title XI of the Organized Crime Control Act of 1970 (Public Law 91-452) added chapter 40, 18 U.S.C. §§ 841-48. This was a "respon[se] to a widespread national concern that existing Federal and State sanctions and prohibitions over the use, possession, and transportation of explosives [were] inadequate," in light of the fact that "[b]ombings and the threat of bombings ha[d] become an ugly, recurrent incident of life in cities and on campuses throughout our Nation." H. Rep. No. 91-1549, 91st Cong., 2d Sess. 2 (1970), *reprinted at* 1970 U.S. Code Cong. and Admin. News 4013 (hereafter "H. Rep. No. 91-1549").

> . . . the term "explosive" means gun powders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j). This provision has been expansively interpreted to include the gunpowder in ammunition inside a loaded handgun. *See United States v. Davis*, 202 F.3d 212, 219 (4th Cir.), *cert. denied*, 120 S. Ct. 2675 (2000).

Section 1101 of Public Law 91-452 states:

> The Congress hereby declares that the purpose of this title [Title XI] is to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials. It is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, storage, or use of explosive materials for industrial, mining, agricultural, or other lawful purposes, or to provide for the importation by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Public Law 91-452, § 1101, *reprinted at* 1970 U.S. Code Cong. and Admin. News 1109.

Title XI "combines the regulatory approach to the distribution and storage of explosives with strengthened and expanded criminal prohibitions that apply to the intentional misuse of explosives." H. Rep. No. 91-1549, *reprinted at* 1970 U.S. Code Cong. & Admin. News 4013.[9] Section 842 contains the regulatory provisions of Title XI, including § 842(a)(3)(a), described in H. Rep. No. 91-1549 as "one of the principal provisions of the chapter—the barring of the interstate shipment, transportation, or receipt of explosive materials by any person other than a licensee or

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[9] Twelve years later, Title XI was described as "designed to provide Federal jurisdiction over the criminal use of explosives (e.g., extortion, terrorism, and revenge)." H. Rep. No. 97-678, 97th Cong., 2d Sess. 3 (1982), *reprinted at* 1982 U.S. Code Cong. and Admin. News 2631 (footnote omitted).

permittee." H. Rep. No. 91-1549, *reprinted at* 1970 U.S. Code Cong. and Admin. News 4042.

Section 844 "sets the penalties for violation of the regulatory provisions of this chapter and creates certain offenses pertaining to the unlawful *use* of explosives." *Id.*, 1970 U.S. Code Cong. and Admin. News 4045 (emphasis added). Specifically, 844(d)[10] proscribes transporting or receiving an explosive in interstate or foreign commerce knowing or intending that it be used to kill, injure, or intimidate an individual or that it will be used[11] to damage or destroy a building, vehicle, or other property; 844(e) prohibits bomb threats; 844(f) relates to the malicious destruction of United States government property by an explosive;[12] 844(g) punishes possession of an explosive in a building owned or leased to the United States; 844(h), the subsection at issue here, punishes the use of an explosive to commit a federal felony ((h)(1)), or carrying an explosive during the commission of a federal felony ((h)(2)); and 844(1) prohibits malicious destruction, by means of an

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[10] The summary of the provisions of section 844 is meant to give an overview, not a detailed description of the various crimes. Although there have been amendments to section 844, they do not affect this basic outline.

[11] Although the Report states that the explosive will be used "lawfully" to damage or destroy, 1970 U.S. Code Cong. and Admin. News 4045, the statute as passed required the explosive be "unlawfully" used. P. L. 91-452, 84 Stat. 922, *reprinted at* 1970 US Code Cong. and Admin. News 1115.

[12] H. Rep. No. 91-1549 notes that willful destruction of government property was already prohibited by 18 U.S.C. § 1361; "[h]owever, because *use of explosives* is so inherently dangerous to life, it is desirable to have specific legislation dealing with destruction by explosives and imposing penalties varying on whether injury or death is caused." H. Rep. No. 91-1549, *reprinted at* 1970 U.S. Code Cong. and Admin. News 4046 (emphasis added).

explosive, of property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce. "[E]xplosive" was broadly defined to include incendiary devices, *see* footnote 1, *supra;* the definition is more expansive than that relating to the regulatory provisions of section 842. *See* 18 U.S.C. §§ 841(d), 844(j); H. Rep. No. 91-1549, *reprinted at* 1970 U.S. Code Cong. and Admin. News 4047.

Thus, 844(h) is one of several provisions enacted specifically to deal with the criminal *use* of explosives.[13] The particular provision with which Mr. Ressam is charged, 844(h), contains two alternative means by which the offense may be committed: the person must either "use[] fire or an explosive to commit any [federal] felony"[14] or "carr[y] an explosive during the commission of any [federal] felony." In light of the express statutory purpose to prohibit the "intentional misuse of explosives," H. Rep. No. 91-1549, *reprinted at* 1970 U.S. Code Cong. and Admin. News 4013, and considered in conjunction with the other provisions of the statute which" effectuate that purpose, it becomes apparent that "during the commission of any [federal] felony" in (h)(2) must be interpreted to require that the

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[13] The only subsection prohibiting the mere possession of explosives is limited to possession within the federal building, 844(g).

[14] The words "fire" were added to subsections (e), (f), (h)(1) and (I) as part of the Anti-Arson Act of 1982. Section 2(b) of the Anti-Arson Act amended (h)(1) of section 844 to provide that whoever uses fire, as well as an explosive, may be prosecuted as provided in that section. H. Rep. No. 97-678, 97th Cong., 2d Sess. 3 (1982), *reprinted at* 1982 U.S. Code Cong. and Admin. News 2633. The Report recognized that "[f]ire is used extensively not only for the criminal purposes of extortion, terrorism, and revenge, but to conceal other crimes such as homicide, and for fraud against insurance companies." *Id.* at 2632 (footnote omitted).

carrying facilitate the underlying felony. The alternative reading—to criminalize the coincidental carrying of an explosive simultaneously with commission of any federal felony, without more—does nothing to further the legislative purpose of reducing the hazard from misuse of explosives, nor is it consistent with the remainder of the statutory scheme.

c. Construction of Statute.

This conclusion is strengthened by examination of § 844(h), itself. Subsection (1) proscribes the *use* of an explosive to commit a federal felony. Here the causal connection between the use and the felony is clear; the explosive must be used "to commit" the felony. Subsection (2) must be read harmoniously with Subsection (1)[15], i.e., a similar causal connection is required.[16] To treat the coincidental carrying of an explosive while a felony is committed, as harshly as the actual use of an explosive to commit such a felony, not only contravenes a common sense interpretation of subsection (h) of the statutory language, but also fails to advance the object of the statutory scheme, considered in its entirety.

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[15] *See Mills v. Taylor*, 967 F.2d at 1400 n.3.

[16] The intent to treat use and carrying similarly is confirmed by the identical punishment provided as to each. Moreover, the nexus between (h)(1) and (h)(2) is further demonstrated by the last phrase of (h), which provides:

> nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was *used or carried*.

(emphasis added.)

Additionally, the harsh penalties contained within this subsection bear directly on construction of the statutory language. Subsection (h) imposes a mandatory, consecutive 10 year sentence. Congressional intent to impose such a harsh sentence would not be served by making it available simply because explosives are being carried at the time a wholly unrelated, nonviolent felony is committed.

Thus, the plain meaning of "during the commission of any [federal] felony," in the context of the entire statutory scheme, and congressional intent, requires a causal connection between the "carrying" and the "felony." Moreover, if this Court concluded that the plain meaning of the statute requires only that there be a carrying at the same time a felony was being committed, such a broad interpretation would lead to absurd results and would be at odds with congressional intent; consequently, it cannot be correct. In light of the very broad definition of explosives, *see* footnote 7, *supra*, in conjunction with the vast proliferation of federal felonies, section (h)(2), without requirement of a causal connection, would potentially be applicable in cases bearing no resemblance to those situations (involving criminal use of explosives) that Congress intended to address by enacting Chapter 40. For example, section 844(h)(2) would apply to a farmer who, while committing an environmental felony by unlawfully discharging a toxic substance into a waterway, (e.g., 33 U.S.C. § 1319(c)(2)) happens to also be carrying dynamite in his pickup truck for the unrelated purpose of blowing up stumps on his farm; a gun shop owner who happens to carry gunpowder or ammunition containing gunpowder in relation to his business while he signs and mails a fraudulent tax return (e.g., 26 U.S.C.. §§ 7201 and 7206); or a police officer who, while lawfully carrying of a loaded handgun, accepts a bribe or

commits a criminal civil rights violation involving bodily injury (e.g., 18 U.S.C. §§ 242 and 666) unrelated to his possession of a handgun.

Clearly there is no logical or other limit to the possible application of 844(h)(2) if the only requirements are that an individual be carrying some material that falls within the expansive definition of "explosives" at the same time he or she commits any one of the myriad of offenses qualifying as federal felonies.

d. Avoiding Constitutional Issues.

Moreover, this Court should adopt the interpretation of 844(h)(2) urged by Mr. Ressam on the basis of the principle that courts should construe statutes in order to avoid constitutional issues. *See United States v. Bulacan*, 156 F.3d 963, 974 (9th Cir. 1998). If 844(h)(2) is interpreted to reach every situation where an individual is carrying any explosive that comes within the broad definition of 844(j) at the same time he commits any of the myriad of felonies contained in the federal criminal code, the interpretation would be constitutionally vulnerable because of vagueness. "The void-for-vagueness doctrine requires that a penal statute define the criminal offense with sufficient definiteness that ordinary people can understand what conduct is prohibited and in a manner that does not encourage arbitrary and discriminatory enforcement." *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983); *United States v. Lanier*, 520 U.S. 259, 266 (1997). A broad construction of 844(h)(2) would reach situations such as those described above, that no reasonable person could understand would be forbidden. In order to avoid this constitutional issue, this Court should give a narrow construction to 844(h)(2), i.e., one that

requires a causal connection between carrying an explosive and commission of the underlying felony.

e. Lenity.

If this Court concludes that the meaning of "during the commission of any [federal] felony" is ambiguous, then it should apply the "related" doctrine: the rule of lenity. *Lanier*, 520 U.S. at 266. Under this rule, if there are two viable interpretations of a criminal statute, then the rule of lenity requires that the court infer the rationale most favorable to the defendant and construe the statute accordingly. Strict construction of criminal statutes ensures fair warning by resolving statutory ambiguity so as to apply the criminal statute only to conduct clearly covered. *Lanier*, 520 U.S. at 266.

f. Analogy to 18 U.S.C. § 924(c).

The construction urged by Mr. Ressam is directly supported by the analogous statute—18 U.S.C. § 924(c)—on which 18 U.S.C. § 844(h) was expressly based. H. Rep. No. 91-1549 states as follows:

> Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a Federal felony.

Reprinted at 1970 U.S. Code Cong. & Admin. News 4046.

When 18 U. S. C. § 844(h) was enacted in 1970, it utilized language virtually identical to that previously used in the firearms context for section 924(c). Section 924(c), as originally enacted, provided:

> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States. . . .[17]

Section 924(c) has always been understood to require that there be a causal connection between the use or carrying of a firearm, and the underlying crime; consequently, 844(h), which was modeled after 924(c), must be similarly understood in the explosives context. Although the government no doubt will point to the absence in 844(h)(2) of the language "in relation to," which is found in the present version of 924(c), that absence is of no significance, for the reasons that follow.

In *United States v. Stewart*, 779 F.2d 538 (9th Cir.), *cert. denied*, 484 U.S. 867 (1987) *overruled in part on other grounds, United States v. Hernandez*, 80 F.3d 1253, 1257 (9th Cir. 1996) (*overruled by Muscarello v. United States*, 524 U.S. 125 (1998)), Judge (now Justice) Kennedy had occasion to construe the provision making it a crime to "carr[y] a firearm unlawfully during the commission of any felony" previously contained in 18 U.S.C. § 924(c) (and

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[17] Presently, section 924(c) provides penalties for

> any person who, during and in relation to any crime of violence or drug trafficking crime (including a crime of violence or drug trafficking crime that provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device) for which the person may be prosecuted in a court of the United States, uses or carries a firearm, or who, in furtherance of any such crime, possesses a firearm. . . .

nearly identical to the present language in 844(h)(2).[18] In a carefully considered opinion, he concluded that the "in relation to" language did not "alter the scope" of the statute:

> Our study of the legislative history of the amendment . . . indicates that the "in relation to" language was not intended to create an element of the crime that did not previously exist but rather was intended to make clear a condition already implicit in the statute.

Id. at 539-40 (citation omitted). He continued:

> The legislative history reveals that because the amendment eliminated the requirement that the firearm be carried unlawfully . . . the "in relation to" language was added to allay explicitly the concern that a person could be prosecuted under section 924(c) for committing an entirely unrelated crime while in possession of a firearm.

Id. (citations omitted). In Judge (now Justice) Kennedy's view, the Congress that enacted 924(c) "intended to require a relation between the firearm and the underlying crime." *Id.* at 540 (citation omitted). The purpose of 924(c) was

> to impose more severe sanctions where firearms facilitated, or had the potential of facilitating, the commission of a felony . . . . That purpose necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm . . . . "Congress did not intend to penalize one who happens to

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[18] The word "unlawfully" which was contained in the original version of section 924(c) was omitted by amendment in 1984. Section 844(h) was amended to remove the word "unlawfully" in 1988.

> have gun in his possession when he commits an entirely unrelated offense."

Id. (citations omitted). Judge Kennedy therefore interpreted the statute

> as if it contained the requirement that the firearm be possessed "during and in relation to" the underlying offense . . . . The relation between the firearm and the underlying offense is an essential element of the crime. . . .

Id. at 540. *See United States v. Mendoza*, 11 F.3d 126, 129 (9th Cir. 1993) (*Stewart* holds that "in relation to" has always been an implicit element of the crime). Judge Kennedy's analysis has been cited with approval in subsequent Supreme Court cases. *See Smith v. United States*, 508 U.S. 223, 238 (1993); *Muscarello v. United States*, 524 U.S. 125, 118 S. Ct. 1911, 1919 (1998). In articulating the meaning of the "in relation to" requirement, the Supreme Court in *Smith* stated "the gun at least must 'facilitat[e], or ha[ve], the potential of facilitating the drug trafficking offense." *Smith*, 508 U.S. 223 at 238 (*quoting Stewart*, 779 F.2d at 540). Applying this principle to the case at bar, the explosive must at least have facilitated or had the potential to facilitate the false statement offense (Count 5) alleged in Count 9 of the Second Superseding Indictment.

The absence of the "in relation to" language in 844(h)(2) is of no significance. The requirement that there be a causal connection clearly flows from the language that the carrying be "during the commission" of the felony. That connection must be there in order to implement the statutory purpose, i.e., to punish the criminal use of explosives, not to punish an individual simply because he is carrying explosives while committing another crime.

Counsel is aware of two cases from other Circuits where the courts have relied on the absence of the "in relation to" language in 844(h)(2) to reject the argument that 844(h)(2) requires a causal connection. *See United States v. Ivy*, 929 F.2d 147 (5th Cir.), *cert. denied*, 502 U.S. 883 (1991); *United States v. Rosenberg*, 806 F.2d 1169 (3d Cir.), *cert. denied*, 481 U.S. 1070 (1986). Those cases are both wrong and factually distinguishable. They are wrong because they overlook the statutory context of 844(h)(2) and reject the significance and cogency of Judge Kennedy's analysis in *Stewart*.[19] By improperly isolating their analysis to subsection (h)(2), these courts find plain meaning which ignores the context of section (h)(2); as a result, they further choose to disregard legislative history.

In direct conflict with the Ninth Circuit analysis in *Stewart*, which the Ninth Circuit reaffirmed in 1993 in *Mendoza*, the *Rosenberg* court stated "we do not find that the legislative history to the 1984 amendment [to § 924(c)] 'strongly implied' that the 'in relation to' language did not affect the scope of the statute as originally drafted." 806 F.3d at 1178. Therefore, to the extent that *Rosenberg* is premised on a disagreement with Ninth Circuit analysis in *Stewart* and that *Ivy* (without analysis) relies exclusively on the outcome in *Rosenberg*,[20] those opinions should have no persuasive value in this Court's analysis. Judge Hig-

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[19] Both cases precede the approval of Judge Kennedy's analysis in the Supreme Court of *Smith* and *Muscarello, supra*.

[20] *Ivy* dealt with this question in cursory fashion, relying exclusively on *Rosenberg*. Moreover, after rejecting the defendant's instructional claim, it went on to find the evidence sufficient to sustain the 844(h)(2) conviction because the bomb "facilitated" the kidnaping. *Id.* At least for some purpose, then, the *Ivy* court considered a causal connection significant to a 844(h)(2) conviction.

ginbotham, the one judge in *Rosenberg* who agreed with the Ninth Circuit's analysis in *Stewart*, concluded:

> *Stewart's* reading of the legislative intent behind § 924(c)(2) and its conclusion that Congress meant to require some proof that the firearm facilitated the underlying felony, convinces me that Congress included a similar relational element in the crime defined by § 844(h)(2).

806 F.3d at 1182 (Higginbotham, J., dissenting).

The majority in *Rosenberg* alternatively relied on Congress' failure to significantly modify section 844(h)(2) to include "in relation" language, as it did with section 924(c). However, as stated by Judge Higginbotham, "it is inappropriate to delete an element of a statutory crime simply because 'Congress has not seen fit' to restate emphatically that statute's meaning." 807 F.2d at 1182 n.7. Moreover, little, if any, significance should be attached to Congressional failure to amend section 844(h)(2), a relatively unused statute, merely because Congress did clarify a statute used far more extensively and no doubt in the forefront of congressional awareness.

Ivy and *Rosenberg* are also distinguishable because the predicate crimes in those cases involved violence. In *Ivy*, the defendant was charged with carrying an explosive device while committing kidnaping. In *Rosenberg*, the predicate crimes for the § 844(b)(2) violation were possession of a sawed-off shotgun and an Uzi semi-automatic rifle. 806 F.2d at 1176. In the case at bar, the predicate offense (Count 5) is a non-violent false statement charge.

g. Conclusion as to Count 9.

Reviewing 18 U.S.C. § 844(h)(2) in the context of the statute in which it is contained (18 U.S.C. § 844(h)); the

entire statutory scheme for explosives offenses; the historical context which encompasses the related firearms crime in 18 U.S.C. § 924(c); and the absurd results which follow if interpreted in isolation, leads to a single conclusion: that Congress clearly intended a requirement that there be a causal relation between carrying the explosive and the underlying felony, i.e., that it be in relation to the felony. Therefore, the Court should use defendant's proposed instruction No. 28 which requires the jury to make this finding as to Count 9.

DATED this 7th day of March, 2001.

Respectfully submitted,

/s/ THOMAS W. HILLIER, II
THOMAS W. HILLIER, II
Federal Public Defender
Attorney for Ahmed Ressam

/s/ MICHAEL FILIPOVIC
MICHAEL FILIPOVIC
Assistant Federal Public Defender
Attorney for Ahmed Ressam

/s/ JO ANN OLIVER
JO ANN OLIVER
Assistant Federal Public Defender
Attorney for Ahmed Ressam

UNITED STATES DISTRICT COURT
FRO THE WESTERN DISTRICT OF WASHINGTON

NO. CR 99-666 JCC

UNITED OF STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

[Filed: Mar. 16, 2001]

DEFENDANT AHMED RESSAM'S PROPOSED JURY INSTRUCTIONS WITH CITATIONS

NOW COMES the defendant, Ahmed Ressam, by his attorneys, Federal Public Defender Thomas W. Hillier, II, Assistant Federal Public Defender Michael Filipovic and Assistant Federal Public Defender Jo Ann Oliver, and hereby requests that the Court instruct the jury with the attached proposed jury instructions. In addition to the authority cited at the end of each proposed jury instruction, the Court is asked to consider the records and files herein, and any arguments made in the defendant's trial memorandum concerning these proposed instructions.[1]

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[1] A computer disc has been provided to the Court containing both cited and uncited versions of these instructions.

DEFENDANT AHMED RESSAM'S PROPOSED INSTRUCTION NO. 28

INSTRUCTION NO.__

The defendant is charged on Count 9 of the Indictment with knowingly carrying an explosive during and in relation to a felony prosecutable in a court of the United States in violation of Section 844(h)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt:

First, the defendant committed the crime of making a false statement to a United States customs inspector as charged in Count 5 of the Indictment;

Second, the defendant knowingly carried an explosive, and

Third, the defendant carried the explosive during and in relation to the false statement crime alleged in Count 5 of the Indictment.

A defendant takes such action "in relation to the crime" if the explosive facilitated or played a role in the false statements charge alleged in Count 5.

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR99-666C

UNITED STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

[Filed: Apr. 3, 2001]

DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 9 PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(a)

NOW COMES the defendant, Ahmed Ressam, by his attorneys, Federal Public Defender Thomas W. Hillier, II, Assistant Federal Public Defender Michael Filipovic, and Assistant Federal Public Defender Jo Ann Oliver, and hereby moves for a judgment of acquittal as to Count 9 of the Second Superseding Indictment, pursuant to Federal Rule of Criminal Procedure 29(a).

In support of this motion, the Court is asked to consider the records and filed herein, the testimony and evidence presented during the government's case-in-chief, as well as the portion of Defendant's Trial Memorandum, Dkt. #206, pp. 21-33, supporting his proposed jury instructions on Count 9. Inasmuch as the government has introduced no evidence that would support a finding that the carrying of

explosives facilitated the false statement charge in Count 5, judgment of acquittal should be granted as to Count 9.

DATED this 3rd day of April, 2001.

Respectfully submitted,

/s/ ILLEGIBLE
Thomas W. Hillier, II
Federal Public Defender
Attorney for Ahmed Ressam

/s/ ILLEGIBLE
Michael Filipovic
Assistant Federal Public Defender
Attorney for Ahmed Ressam

/s/ ILLEGIBLE
Jo Ann Oliver
Assistant Federal Public Defender
Attorney for Ahmed Ressam

CERTIFICATE OF SERVICE

I hereby certify that on April 3, 2001, I caused to be hand delivered a copy of DEFENDANT'S MOTION FOR JUDGMENT OF ACQUITTAL AS TO COUNT 9 PURSUANT TO FEDERAL RULE OF CRIMINAL PROCEDURE 29(a), and proposed ORDER, to:

Francis J. Diskin
Chief Assistant U.S. Attorney

Andrew Hamilton
Assistant U.S. Attorney

Steven Gonzalez
Assistant U.S. Attorney

DATED this 3 day of April, 2001.

/s/ MICHAEL FILIPOVIC
MICHAEL FILIPOVIC

UNITED STATES DISTRICT COURT FOR THE CENTRAL DISTRICT OF CALIFORNIA

NO. CR-99-666-JCC

UNITED OF STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

[Filed: Apr. 6, 2001]

INSTRUCTION NO. 42

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* * * * *

The defendant is charged in Count 9 of the indictment with carrying an explosive during the commission of a felony in violation of Section 844(h)(2) of Title 18 of the United States Code. In order for the defendant to be found guilty of that charge, the government must prove each of the following elements beyond a reasonable doubt.

First, the defendant knowingly carried explosive materials; and

Second, the defendant committed the felony of making a false statement to a U S Customs Inspector (as charged in Count 5 of the Indictment) while he was carrying those explosive materials.

[682]

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

CASE NO. CR 99-666-JCC

UNITED OF STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, AKA BENNI NORRIS, DEFENDANT

Wednesday, Apr. 4, 2001

REPORTER'S TRANSCRIPT OF PROCEEDINGS

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[683]

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MR. GONZALEZ: Your Honor, the defense and counsel for the government have gone over the exhibit list and also with the court clerk. There's some exhibits that are in evidence or the parties believe were in evidence either during the trial or during the course of some of the videotapes which might not have been apparent. And so I'd like to offer those now and make sure they are in the record.

THE COURT: All right.

MR. GONZALEZ: They are 4038, 4039, 4040, 4041, 4042, 4043, 4044, 4045. Also 8032, 1001, 1004A, 1004B, and 4006A. We'd offer those at this time.

MR. FILIPOVIC: No objection.

THE COURT: They will be admitted.

(The above-mentioned exhibits were admitted.)

THE COURT: Let me state for the record what we've discussed off the record before we started this morning and that is I propose that if the jury hasn't reached a verdict by the end of the day on Friday, that subject to their ability to do so, that they deliberate on Saturday. And I've made arrangements to have the building opened to the press and the public as well as air conditioning and the like on the floor.

In addition, I'm denying the motions to dismiss that the defendants submitted yesterday with the exception of [684] Count 7. And on that, I want to hear more from the government. The plaintiffs—or the defendants memorandum of authorities asserts that there is a case from the Western District of Washington, Judge Zilli and an 11th circuit opinion. Both of which appear according to their memorandum to be very close in fact to our case. And I need to have you folks analyze that before the case is submitted to the jury and give me your response.

MR. HAMILTON: May we get back to the Court towards this afternoon?

THE COURT: Yes. And then we also discussed dealing with the Court instructions and what I would propose is let's see how far we get today and how late in the day it is before we finish with the evidence. If it's relatively early in the day, then we'll take an extended break and then

to give you a time to analyze the instructions and then have an instruction conference in the— later in the day. Does that make sense?

MR. FILIPOVIC: Yes, Your Honor. Just for planning purposes, I believe we'll probably finish the defense case by noon today.

THE COURT: Then what I would suggest is, if that happens then, we'll probably break until 2:30 and take up the instructions at that time. Okay. Are we ready for the jury? Let's bring them in.

(Jury present.)

[685]

THE COURT: I'm not going to make the change. I understand the exception.

MR. FILIPOVIC: We would take exception to Court's instruction number 40, the definition of destructive device as opposed to the definition we have submitted.

With respect to instruction number 42, that is the instruction dealing with Count 9 and the issue of whether this statute requires that the carrying of the explosive be in relation to the underlying felony, and as we have indicated in our briefs, while there are two circuits that have ruled against the defense in the argument, there is a Ninth Circuit case written by Judge—now Justice Kennedy of the Supreme Court that strongly supports our legal analysis, and I believe Judge Higginbotham in one of the two out of circuit cases has also agreed with that analysis.

Otherwise, we run into this situation where if you apply the statute literally as I indicated in my brief, if you have a police officer who has explosives and if the bullets he is carrying in his gun and that is explosive material, and he

commits a civil rights violation, he is then committing this ten year mandatory minimum felony.

There is no—it is our position there has to be some relationship—some causal relationship between the carrying of the explosives and the underlying felony [686] similar to what is required in the 924C area which is where both of these statutes began.

THE COURT: What if you added a phrase at the end of the second paragraph saying something to the effect that, "the defendant committed this felony to facilitate the transfer of the explosive materials."

MR. FILIPOVIC: Well perhaps Mr. Diskin wishes to address that first.

MR. DISKIN: I would be opposed to that, Your Honor. 924C is different than 844. 924C includes the phrase, "during and in relation to."

Congress made it clear that that was a requirement there, and even the Ninth Circuit after a long line of cases suggesting that the presence of the firearm in the marijuana grow or in the trunk of the car was good enough, Baily made it clear that that was, for example, not a use but a future use and that during and in relation to meant what it said.

There is no such relation to language in 844, and I think the—

THE COURT: Well, I guess all I'm suggesting is that the change under the facts of this case wouldn't make any difference in your case, but it would eliminate an appellate issue.

[687]

MR. DISKIN: I respectfully would counsel or urge the Court not to make the change.

THE COURT: All right.

* * * * *

UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

NO. CR99-666C

UNITED STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

[Filed: Feb. 26, 2003]

GOVERNMENT'S MOTION PURSUANT TO
U.S.S.G. SECTION 5K1.1

The United States of America, by and through John McKay, United States Attorney for the Western District of Washington, and Francis J. Diskin and Andrew R. Hamilton, Assistant United States Attorneys for said District, moves this Court, pursuant to Section 5K1.1, United States Sentencing Guidelines, to sentence Ahmed Ressam below the otherwise applicable guideline range. This motion is based on Mr. Ressam's substantial assistance in the case of United States v. Mokhtar Haouari, a matter prosecuted in the Southern District of New York in the summer of 2001.

The government further moves the Court to permit the government to brief the substance of the defendant's cooperation in the above captioned case and to address other assistance the defendant may provide in the investigation

and prosecution of others at a future time. In order to assess the nature and quality of Mr. Ressam's further assistance, the government renews its request that the defendant's sentencing hearing be continued subject to call.

DATED this 26th day of February, 2003.

Respectfully submitted,

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United States Attorney

/s/ FRANCIS J. DISKIN
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Assistant Unite States Attorney

/s/ ANDREW R. HAMILTON
ANDREW R. HAMILTON
Assistant United States Attorney

UNITED STATES DISTRICT COURT FOR THE
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

Case No. CR99-666C

UNITED STATES OF AMERICA, PLAINTIFF

v.

AHMED RESSAM, DEFENDANT

July 27, 2005

TRANSCRIPT OF PROCEEDINGS
BEFORE THE HONORABLE
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UNITED STATES DISTRICT JUDGE

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* * * * *

[31]

THE COURT: Anything further? All right. I'm going to impose a period of confinement of a total of 22 years, which I'm going to ask the government to allocate that according to the statutory minimums among the counts in consecutive and concurrent as necessary to arrive at a total of 22 years. And a period of supervised release of five years subject to the standard conditions, together with those additional conditions set forth in the presentence report.

Mr. Ressam, you may have a right to appeal this sentence. If you wish to file, a notice of appeal must be filed within 10 days of today. If you wish the assistance of an attorney in filing a notice of appeal, one will be appointed to assist you if you so request. If you wish the assistance of the clerk in filing a notice of appeal, she will assist you if you so request.

Do you understand, sir?

MR. HILLIER: Your Honor, may I ask the Court to recommend to the Bureau of Prisons that Mr. Ressam remain incarcerated as he currently is?

THE COURT: Yes. Let me say a few things. First of all—

MR. BARTLETT: Your Honor, with regard to that—

THE COURT: Yes.

MR. BARTLETT: —I just want the Court and I want Mr. [32] Hillier and Mr. Ressam to be aware that the Court will just have a recommendation with regard to that. My understanding with regard to that program is that it's highly likely that he will not be eligible for that program, and I don't want the Court or Mr. Hillier to be misled as to the likelihood that he will remain in that program.

MR. HILLIER: I know better than to get my hopes up, Your Honor, but the recommendation could help. Thank you.

THE COURT: Okay. Let me say a few things. First of all, it will come as no surprise to anybody that this sentencing is one that I have struggled with a great deal, more than any other sentencing that I've had in the 24 years I've been on the bench.

I've done my very best to arrive at a period of confinement that appropriately recognizes the severity of the intended offense, but also recognizes that practicalities of the parties' positions before trial and the cooperation of Mr. Ressam, even though it did terminate prematurely.

The message I would hope to convey in today's sentencing is two-fold: First, that we have the resolve in this country to deal with the subject of terrorism and people

who engage in it should be prepared to sacrifice a major portion of their life in confinement.

Secondly, though, I would like to convey the message that our system works. We did not need to use a secret military tribunal, [33] or detain the defendant indefinitely as an enemy combatant, or deny him the right to counsel, or invoke any proceedings beyond those guaranteed by or contrary to the United States Constitution.

I would suggest that the message to the world from today's sentencing is that our courts have not abandoned our commitment to the ideals that set our nation apart. We can deal with the threats to our national security without denying the accused fundamental constitutional protections.

Despite the fact that Mr. Ressam is not an American citizen and despite the fact that he entered this country intent upon killing American citizens, he received an effective, vigorous defense, and the opportunity to have his guilt or innocence determined by a jury of 12 ordinary citizens.

Most importantly, all of this occurred in the sunlight of a public trial. There were no secret proceedings, no indefinite detention, no denial of counsel.

The tragedy of September 11th shook our sense of security and made us realize that we, too, are vulnerable to acts of terrorism. Unfortunately, some believe that this threat renders our Constitution obsolete. This is a Constitution for which men and women have died and continue to died and continue to die and which has made us a model among nations. If that view is allowed to prevail, the terrorists will have won.

It is my sworn duty, and as long as there is breath in my [34] body I'll perform it, to support and defend the Constitution of the United States.

We will be in recess.

(Recess.)

* * * * *

PETITIONER'S BRIEF

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No. 07-455

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." The question presented is whether Section 844(h)(2) requires that the explosive be carried "in relation to" the underlying felony.

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In the Supreme Court of the United States

No. 07-455

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-23a) is reported at 474 F.3d 597.

JURISDICTION

The judgment of the court of appeals was entered on January 16, 2007. A petition for rehearing was denied on June 6, 2007 (Pet. App. 24a-31a). On August 22, 2007, Justice Kennedy extended the time within which to file a petition for a writ of certiorari to and including October 4, 2007, and the petition was filed on that date. The petition for a writ of certiorari was granted on December 7, 2007. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

STATUTORY PROVISIONS INVOLVED

The relevant statutory provisions are reproduced in the appendix to the petition for a writ of certiorari. Pet. App. 32a-36a.

STATEMENT

Respondent was indicted on nine counts resulting from his attempt to smuggle explosives and timing devices into the United States with the intent to detonate an explosive at Los Angeles International Airport (LAX) around the time of the millennium. Pet. App. 1a. Following a jury trial in the United States District Court for the Western District of Washington, respondent was convicted of conspiring to commit an act of terrorism transcending a national boundary, in violation of 18 U.S.C. 2332b(a)(1)(B) (Count 1); placing explosives in proximity to a terminal, in violation of 18 U.S.C. 33 (Count 2); possessing false identification documents with intent to defraud the United States, in violation of 18 U.S.C. 1028(a)(4) (Count 3); entering the United States using a fictitious name, in violation of 18 U.S.C. 1546 (Count 4); making a false statement to a United States customs official, in violation of 18 U.S.C. 1001 (Count 5); smuggling explosives into the United States, in violation of 18 U.S.C. 545 (Count 6); transporting explosives without a permit, in violation of 18 U.S.C. 842(a)(3)(A) (Count 7); possessing an unregistered destructive device, in violation of 26 U.S.C. 5845(a) and 5861(d) (Count 8); and carrying an explosive during the commission of a felony (the false statement offense charged in Count 5), in violation of 18 U.S.C. 844(h)(2) (Count 9). J.A. 13, 18-23. He was sentenced to 22 years of imprisonment. J.A. 74. A divided panel of the court of appeals reversed respondent's conviction on the Section 844(h)(2) count,

holding that the government had been required to establish that the explosives were carried "in relation to" the underlying false statement offense charged in Count 5. Pet. App. 1a-23a.

1. Section 844(h) prescribes a mandatory ten-year term of imprisonment for any person who

> (1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States.

18 U.S.C. 844(h); see *ibid.* (mandating twenty years of imprisonment in the case of a "second or subsequent conviction"); 18 U.S.C. 844(j) (definition of "explosive").

2. Respondent is an Algerian citizen. Pet. App. 3a. In 1998, he was recruited by an al Qaeda operative while living in Canada. *Ibid.* After using a forged baptismal certificate to obtain a Canadian passport in the name Benni Antoine Noris, respondent traveled to Afghanistan, where he received advanced training in the manufacture and use of explosives. *Id.* at 3a-4a. During that period, respondent and others conceived a plot to target a United States airport to coincide with the millennium. *Id.* at 4a.

On November 17, 1999, respondent and another al Qaeda operative traveled to Vancouver, British Columbia, where they rented a Chrysler 300M and checked into a motel. Pet. App. 4a. On December 14, 1999, the pair drove to Tsawwassen, British Columbia, where they took a car ferry to Victoria on Vancouver Island. *Ibid.*; J.A. 20, 41-42. Hidden in the Chrysler's spare tire well were the components of a bomb, including explosives,

timing devices, detonators, fertilizer, and aluminum sulfate. Pet. App. 4a. Following their arrival in Victoria, respondent's accomplice returned to Vancouver via public transportation, and respondent boarded the day's only car ferry from Victoria to Port Angeles, Washington. *Ibid.*; J.A. 27.

When the ferry arrived at Port Angeles, respondent's vehicle was the last to off-load, and respondent became agitated when questioned by a United States customs inspector. Pet. App. 5a; J.A. 29-30. The customs inspector instructed respondent to complete a customs declaration form, on which respondent claimed to be a Canadian citizen and signed his name as Benni Noris. Pet. App. 5a; J.A. 30-31. The customs inspector then directed respondent to turn off his car, open the trunk, and get out of the vehicle so that a secondary inspection could be performed. J.A. 32-33. The car was searched, and the explosives and other items were discovered. Pet. App. 5a; J.A. 36-39. An expert later determined that a bomb made from the components found in respondent's vehicle could have killed or injured hundreds of people if detonated during the holiday travel rush at LAX. Pet. App. 5a.

3. On February 14, 2001, a grand jury returned a nine-count Second Superseding Indictment. J.A. 18-23. Count 9 charged a violation of 18 U.S.C. 844(h)(2). It read:

> On or about December 14, 1999, * * * [respondent] knowingly carried an explosive during the commission of a felony prosecutable in a court of the United States, that is making a false statement to a U.S. Customs Inspector as charged in Count 5.

J.A. 22.

At trial, respondent filed a motion for a judgment of acquittal on Count 9, arguing that the act of carrying explosives had played no role in the false statement offense charged in Count 5. J.A. 62-63. The district court denied that motion. J.A. 67. Respondent also unsuccessfully objected to the district court's jury instructions on Count 9 because they did not contain a relational requirement. J.A. 68-70; see J.A. 61 (respondent's proposed jury instruction on Count 9). The district court charged the jury that, in order to return a verdict of guilty on Count 9, it was required to find:

> First, the defendant knowingly carried explosive materials; and
>
> Second, the defendant committed the felony of making a false statement to a U S Customs Inspector (as charged in Count 5 of the Indictment) while he was carrying those explosive materials.

J.A. 65.

The jury found respondent guilty on all counts. Pet. App. 6a; J.A. 13. The district court sentenced him to a total of 22 years of imprisonment. J.A. 74.

4. The government appealed the sentence as unreasonable, and respondent filed a cross-appeal challenging the sufficiency of the evidence on Count 9. A divided panel of the court of appeals reversed respondent's conviction on Count 9 and remanded for resentencing without reaching the government's arguments. Pet. App. 1a-23a.

a. The majority viewed itself as "constrained" by the court of appeals' earlier decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) (Kennedy, J.). Pet. App. 2a. *Stewart* involved 18 U.S.C. 924(c), which at the time of the defendant's conduct in that case had pro-

scribed "carr[ying] a firearm unlawfully during the commission of any felony." 18 U.S.C. 924(c)(2) (1982). Shortly before the Ninth Circuit's decision in *Stewart*, Congress had amended Section 924(c) by deleting the word "unlawfully" and adding "and in relation to" after "during." See Comprehensive Crime Control Act of 1984 (1984 Firearms Amendment), Pub. L. No. 98-473, Tit. II, § 1005(a), 98 Stat. 2138. The legislative history of that subsequent amendment, *Stewart* concluded, "reveal[ed] an understanding on the part of the amending Congress that the earlier Congress intended to require a relation between the firearm and the underlying crime." 779 F.2d at 540; see *id.* at 539 (citing S. Rep. No. 225, 98th Cong., 1st Sess. 312-314 (1983) (*1983 Senate Report*)). Based on that subsequent history, as well as the "sparse" legislative history of the original statute, *Stewart* interpreted the pre-amendment version of Section 924(c)(2) "as if it contained the requirement that the firearm be possessed 'during and in relation to' the underlying offense." *Id.* at 540.

In this case, the court of appeals reasoned that *Stewart's* construction of former Section 924(c)(2) required the conclusion that "§ 844(h)(2) necessarily always had a relational element as well." Pet. App. 11a. Section 844(h), the court of appeals emphasized, was patterned after Section 924(c), and the original version of the explosives statute "was identical to the original firearms counterpart that we considered in *Stewart*." *Id.* at 9a-10a. The court of appeals acknowledged that Congress had, post-*Stewart*, amended Section 844(h)(2) by striking the word "unlawfully" without at the same time adding "and in relation to" as it had done with Section 924(c). *Id.* at 10a-11a. But the court of appeals stated that the legislative history of that amendment "does not

specifically say why" Section 844(h)(2) was amended in that manner, and it reasoned that "[b]ecause in *Stewart* we did not think addition of the phrase 'and in relation to' changed the scope of original § 924(c), we are hard-pressed now to say that its absence changes the scope of § 844(h)(2)." *Id.* at 11a.

Having interpreted Section 844(h)(2) as including an implicit relational element, the court of appeals stated that there was "no real dispute that [respondent's] conviction on Count 9 cannot stand." Pet. App. 12a. Although respondent had conceded that the government introduced "ample evidence" that he made a false statement on his customs form and that "he carried explosives in the trunk of his car," the court stated that there was "no evidence" that the explosives "facilitated" or "aided the commission of" the underlying false statement offense. *Id.* at 12a-13a (quoting *Stewart*, 779 F.2d at 540).

b. Judge Alarcón dissented from the court of appeals' decision to reverse respondent's conviction on Count 9. Pet. App. 14a-23a. In his view, the statutory text plainly and unambiguously demonstrates that Section 844(h)(2) contains no relational requirement, and the court "lack[ed] the constitutional authority to add an element to a criminal statute." *Id.* at 19a.

5. The court of appeals denied the government's petition for rehearing en banc. Pet. App. 24a-31a. Judge O'Scannlain, joined by five other active circuit judges, dissented from that decision. *Id.* at 25a-31a. Congress's failure to add the words "and in relation to" when it amended the explosives statute in 1988, Judge O'Scannlain argued, meant that the court was "not 'constrained' by *Stewart*'s reasoning in deciding the proper interpretation of § 844(h)(2)." *Id.* at 28a. In addition,

Judge O'Scannlain stated that it was "reasonable to question the validity of *Stewart's* reasoning," because that decision had relied "upon the legislative history of an amendment to determine the scope of the pre-amendment statute," and because "other courts have not read the legislative history relied upon by *Stewart* to be so clear." *Id.* at 30a-31a n.3 (citing *United States* v. *Rosenberg*, 806 F.2d 1169, 1178 (3d Cir. 1986), cert. denied, 481 U.S. 1070 (1987)).

SUMMARY OF ARGUMENT

A. Section 844(h)(2) proscribes "carr[ying] an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). The statute does not say the explosive must have been carried "in relation to" the underlying felony, nor does it contain any language that can bear that construction. "[D]uring" suggests only a temporal connection; it means "at the same time as," not "at the same time and in connection with." That straightforward reading is reinforced by the fact that the adjacent prohibition in Section 844(h)(1), which applies when a person "uses fire or an explosive to commit" another felony, clearly requires a connection beyond a mere temporal relationship between a defendant's possession of an explosive and the perpetration of the underlying felony.

B. Congress has expressly included the very words that the Ninth Circuit read into Section 844(h)(2) in a closely related provision. Section 924(c)(1) of Title 18, United States Code, prohibits carrying a firearm "during and in relation to" certain specified offenses. Because it is undisputed that Section 844(h) was patterned on Section 924(c), the lack of similar language in Section

844(h)(2) is best viewed as reflecting a deliberate congressional choice.

C. Because the text of Section 844(h)(2) is clear and unambiguous, there is no need to resort to legislative history. Nonetheless, the statute's history confirms the plain meaning of the text. As originally drafted, both Section 924(c) and Section 844(h)(2) proscribed "carrying [an item] unlawfully during the commission of" certain specified offenses. In 1984, Congress amended Section 924(c), the firearms statute, by deleting the word "unlawfully" and adding the words "and in relation to" after "during." In 1988, Congress amended Section 844(h)(2), the explosives statute, by deleting the word "unlawfully," but Congress conspicuously failed to add the words "and in relation to." A committee report prepared in connection with the 1984 amendments to the firearms statute expressly recognized that, absent the words "unlawfully" or "and in relation to," the statute would apply when a defendant's carrying of the firearm "played no part in" the underlying offense. In addition, the Department of Justice advised Congress in 1985 that the elimination of the word "unlawfully" from Section 844(h)(2) would result in the statute being expanded to cover "all cases in which explosives are carried during the commission of a federal felony."

D. The Ninth Circuit's own previous decision in *United States* v. *Stewart*, 779 F.2d 538 (9th Cir. 1985) (Kennedy, J.), does not support reading into Section 844(h)(2) a relational element that appears nowhere in the statutory text. *Stewart* construed a different statute that was amended at a different time and in different ways, and did not purport to interpret Section 844(h).

E. The canon against reading general language in a statute to produce absurd results has no application

here. Given the inherent dangerousness of explosives, as well the relative infrequency of situations in which a person will have a legitimate reason for carrying one, there is nothing irrational or absurd about mandating enhanced punishment for any person who carries an explosive while committing a federal felony. Respondent relies on a few hypothetical scenarios to which Section 844(h)(2) might potentially extend, but a party who invokes the absurd results canon to create an exception to otherwise clear statutory language must, at minimum, demonstrate that a straightforward reading of the text produces an absurd result in his own case. Respondent has not attempted to do so. In any event, it is unclear whether the examples respondent posits would be truly absurd.

F. The rule of lenity is inapplicable. The statutory text is clear and unambiguous, and supplying an element that Congress itself omitted goes well beyond the rule's limited role.

ARGUMENT

IN A PROSECUTION BROUGHT UNDER 18 U.S.C. 844(h)(2), THE GOVERNMENT IS NOT REQUIRED TO PROVE THAT THE EXPLOSIVE WAS CARRIED "IN RELATION TO" THE UNDERLYING FELONY

Section 844(h)(2) mandates a ten-year term of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). For purposes of these proceedings, respondent does not deny that he gave a false name to a United States customs inspector, or that his conduct constituted a "felony which may be prosecuted in a court of the United States." *Ibid.*; see Pet. App. 12a. Nor does re-

spondent deny that, at the time he committed that offense—*i.e.*, "during" it, he was "carr[ying]" the items found concealed in the trunk of his car, or that those items constituted "an explosive" within the meaning of Section 844(h)(2). *Ibid.* The Ninth Circuit nevertheless concluded that respondent is entitled to a judgment of acquittal on Count 9 because the government did not prove that his act of carrying the explosives "facilitated" or "aided the commission of" the underlying false statement offense charged in Count 5. *Id.* at 12a-13a (quoting *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985) (Kennedy, J.)).

The court of appeals' decision is wrong. It conflicts with the statutory text and basic principles of statutory construction. Nothing in Section 844(h)'s text even remotely suggests that the explosive must have been carried "in relation to" the underlying felony. Rather, the only textual requirement is that the explosive be carried "during the commission of" the felony. "During" simply does not mean "during and in relation to." This Court has repeatedly emphasized that courts should not "read * * * absent word[s] into [a] statute." *Lamie* v. *United States Trustee*, 540 U.S. 526, 538 (2004). No basis exists for departing from that principle here.

A. The Text Of 18 U.S.C. 844(h) Makes Clear That Section 844(h)(2) Does Not Require Proof That The Explosive Was Carried "In Relation To" The Underlying Felony

1. This Court often has emphasized that "[t]he definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute." *Staples* v. *United States*, 511 U.S. 600, 604 (1994) (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)).

Thus, "in determining what facts must be proved beyond a reasonable doubt, the * * * legislature's definition of the elements of the offense is usually dispositive." *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986); see *Clark* v. *Arizona*, 126 S. Ct. 2709, 2719 (2006) (noting this Court's "traditional recognition of a State's capacity to define crimes and defenses"); *Almendarez-Torres* v. *United States*, 523 U.S. 224, 228 (1998) (stating that, subject to constitutional limitations, "the question of which factors are [elements of a criminal offense] is normally a matter for Congress").

The primary and generally exclusive source for identifying the elements of a criminal offense is the statutory text, and this Court has often declined to add elements that have no basis in that text. In *Bates* v. *United States*, 522 U.S. 23 (1997), the Court unanimously held that a specific intent to injure or defraud is not an element of the crime of knowingly and willfully misapplying federally insured student loan funds under 20 U.S.C. 1097(a). The Court observed that "[t]he text of § 1097(a) does not include an 'intent to defraud' state of mind requirement" and stated that it "ordinarily resist[s] reading words or elements into a statute that do not appear on [the statute's] face." *Bates*, 522 U.S. at 29. Similarly, in *United States* v. *Wells*, 519 U.S. 482 (1997), the Court held that materiality is not an element of the crime of knowingly making a false statement to a federally insured bank under 18 U.S.C. 1014, noting that "[n]owhere does [the statutory text] say that a material fact must be the subject of the false statement or so much as mention materiality." 519 U.S. at 490; see *National Org. for Women, Inc.* v. *Scheidler*, 510 U.S. 249, 256-257 (1994) (rejecting argument that 18 U.S.C. 1962(c) requires proof of economic motive; "[n]owhere in [the statute] is

there any indication that an economic motive is required"); *United States* v. *Culbert*, 435 U.S. 371, 373, 380 (1978) (rejecting claim that, to establish a violation of the Hobbs Act, 18 U.S.C. 1951, it must be shown that a defendant engaged in "racketeering" activities, and stating that "the absence [in the statute] of any reference to 'racketeering' * * * is strong evidence that Congress did not intend to make 'racketeering' an element of a Hobbs Act violation").

2. The principle that Congress's definition of the elements of a criminal offense is controlling absent constitutional constraints mandates the conclusion that, in a prosecution brought under 18 U.S.C. 844(h)(2), the government is not required to prove that the explosive was carried "in relation to" the underlying felony. Those words do not appear in the text of Section 844(h)(2), which simply makes it unlawful to "carr[y] an explosive during the commission of any felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). See Pet. App. 29a (O'Scannlain, J., dissenting from denial of rehearing en banc) (stating that "the plain language of § 844(h)(2) says nothing about a relational element").

Nor is a relational requirement implicit in the phrase "during the commission of." 18 U.S.C. 844(h)(2). Because those words are undefined in the statute, their meaning "has to turn on the language as we normally speak it." *Watson* v. *United States*, 128 S. Ct. 579, 583 (2007); accord *Logan* v. *United States*, 128 S. Ct. 475, 482 (2007) (discussing "[t]he ordinary meaning" of the undefined statutory term "restored"); *Smith* v. *United States*, 508 U.S. 223, 228 (1993) ("When a word is not defined by statute, we normally construe it in accord with its ordinary or natural meaning."). "The plain ev-

eryday meaning of 'during' is 'at the same time' or 'at a point in the course of.' It does not normally mean 'at the same time and in connection with.'" *United States* v. *Rosenberg*, 806 F.2d 1169, 1178-1179 (3d Cir. 1986) (citation omitted), cert. denied, 481 U.S. 1070 (1987); accord *Black's Law Dictionary* 456 (6th ed. 1990) (defining "during" as "[t]hroughout the course of; throughout the continuance of; in the time of; after the commencement and before the expiration of"); *The American Heritage Dictionary of the English Language* 572 (3d ed. 1992) ("[t]hroughout the course or duration of" or "[a]t some time in"); *The Random House Dictionary of the English Language* 608 (2d ed. 1987) ("throughout the duration, continuance, or existence of" or "at some time or point in the course of"); *Webster's Third New International Dictionary of the English Language* 703 (1993) (when used as a preposition, "during" means "throughout the continuance or course of" or "at some point in the course of"). According to a plain and ordinary reading of Section 844(h)(2), therefore, the only requirements are that the defendant must have been carrying an explosive *at the same time as* "the commission of" the underlying felony.

The contrast in language between Section 844(h)(1) and (2) confirms that the latter does not mandate proof that the explosive was carried in relation to the underlying felony. Whereas Section 844(h)(1) requires that fire or an explosive have been "use[d] * * * to commit" the underlying felony, Section 844(h)(2) provides that the explosive must only have been "carrie[d] * * * during the commission of" it. Because subsection (h)(1) clearly requires proof that the fire or explosive "aided the commission of the underlying felony in some way," Pet. App. 13a, Subsection (h)(2)'s omission of any similar formula-

tion underscores that the only connection mandated by that provision is a temporal one.

A dissenting judge in a different case argued that Section 844(h)(2) must contain an implicit relational element in order for the words "the commission of" to retain "some independent meaning." *Rosenberg*, 806 F.2d at 1181 n.2 (Higginbotham, J., dissenting) (quoting 18 U.S.C. 844(h)(2) (1982)). But the phrase "during the commission of any felony" is roughly synonymous with "during any felony," such that the additional words need not be interpreted as playing an independent role in the statute. Furthermore, "[s]urplusage does not always produce ambiguity," *Lamie*, 540 U.S. at 536, and "[i]t is appropriate to tolerate a degree of surplusage rather than adopt a textually dubious construction," *United States* v. *Atlantic Research Corp.*, 127 S. Ct. 2331, 2337 (2007); see *Lamie*, 540 U.S. at 536 (stating that "[w]here there are two ways to read" a statute's text, one of which generates surplusage but renders the statutory meaning plain and one of which avoids surplusage but introduces ambiguity, "the rule against surplusage is, absent other indications, inappropriate"). Judge Higginbotham did not explain how the words "the commission of" can be reasonably understood as "connecting the possession of illegal explosives to the *perpetration* of some other felonious act," *Rosenberg*, 806 F.2d at 1180-1181, and, as already explained, see pp. 14-15, *supra*, the contrast between Section 844(h)(1) and (2) confirms that the latter requires no such connection.

At any rate, the words "the commission of" in Section 844(h)(2) are not "mere surplusage." *BP Am. Prod. Co.* v. *Burton*, 127 S. Ct. 638, 648 (2006). For one thing, they conform the provision to normal usage, because it would be at least somewhat unusual to refer to a person doing

something "during any felony," which is how the statute would read in the absence of "the commission of." 18 U.S.C. 844(h)(2). In addition, those words confirm that it is the defendant—rather than some other individual—who must commit the underlying felony "during" which the explosive is carried, and that the possession of explosives during only the planning stage of a felony would not suffice. See *Scheidler* v. *National Org. for Women, Inc.*, 547 U.S. 9, 22 (2006) (stating that the presumption against surplusage is inapplicable so long as the words in question have even "a small amount of additional work * * * to do").

Examination of all parts of Section 844(h)(2) yields the same conclusion: There is simply no textual basis for concluding that, under Section 844(h)(2), the government must prove that the explosive was carried "in relation to" the underlying felony. "Thus, under the first criterion in the interpretive hierarchy, a natural reading of the full text, a [relational requirement] would not be an element of [Section 844(h)(2)]." *Wells*, 519 U.S. at 490 (citation omitted).

B. The Presence Of An Express Relational Element In 18 U.S.C. 924(c)(1) Confirms That Section 844(h)(2) Does Not Contain An Implicit One

The fact that "during" simply does not mean "during and in relation to" is sufficient to decide this case. But if further evidence were needed that the words "and in relation to" have independent meaning and are necessary to introduce a relational requirement, it is provided by the text of 18 U.S.C. 924(c)(1)(A). The Ninth Circuit's conclusion that Section 844(h)(2) contains an entirely unstated relational requirement is undermined by

the fact that such a requirement is set forth expressly in that closely related provision.

1. This Court has stated that "[w]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion and exclusion." *Russello* v. *United States*, 464 U.S. 16, 23 (1983) (citation omitted); see *Bates*, 522 U.S. at 29-30. The Court has applied a similar analysis when a relevant comparison of different statutes suggests that the presence of certain language in one indicates that the absence of such language reflects a deliberate congressional choice. In *United States* v. *Shabani*, 513 U.S. 10 (1994), for example, the Court unanimously rejected the argument that courts should read into the drug conspiracy statute, 21 U.S.C. 846, a requirement that a conspirator have committed an overt act in furtherance of the conspiracy. In so holding, the Court cited the fact that, unlike the general conspiracy statute, 18 U.S.C. 371, the text of Section 846 does not contain an overt act requirement. *Shabani*, 513 U.S. at 14; see *Whitfield* v. *United States*, 543 U.S. 209, 214 (2005) (stating that, in *Shabani*, the Court "found instructive the distinction between [the drug conspiracy] statute and the general conspiracy statute").

2. As the Ninth Circuit and other courts of appeals have recognized, Section 844(h)(2) was modeled on the predecessor of 18 U.S.C. 924(c)(1)(A). See Pet. App. 9a-10a, *Rosenberg*, 806 F.2d at 1178; accord H.R. Rep. No. 1549, 91st Cong., 2d Sess. 69 (1970) (*1970 House Report*). In its current form, Section 924(c)(1)(A) expressly prohibits the use or carrying of a firearm "during *and*

in relation to" the underlying offense. 18 U.S.C. 924(c)(1)(A) (emphasis added).

Given the close connection between the two provisions, the presence of "this additional element in [Section 924(c)(1)(A)]," and its complete absence in Section 844(h)(2), "speaks volumes." *Shabani*, 513 U.S. at 14. Indeed, "the question here is not whether identical or similar words should be read *in pari materia* to mean the same thing. Rather, the question is whether Congress intended its different words to make a legal difference." *Burlington N. & Santa Fe Ry.* v. *White*, 126 S. Ct. 2405, 2412 (2006) (citations omitted). The most natural inference from a side-by-side comparison of the two provisions is that Congress deliberately omitted the "and in relation to" language from Section 844(h)(2) because it intended there to be no such requirement.

C. The Statute's History Confirms That The Absence Of A Relational Element In Section 844(h)(2) Reflects A Deliberate Congressional Choice

1. As the previous sections explained, an examination of Section 844(h)(2)'s full text makes clear that it contains no implicit relational element, and that conclusion is confirmed by the contrast between Section 844(h)(2) and Section 924(c)(1)(A). There is thus neither need nor warrant to consider legislative history in resolving this case. See *Whitfield*, 543 U.S. at 215 (no need to consider legislative history where "the meaning of [the statutory] text is plain and unambiguous"); *Lamie*, 540 U.S. at 536 ("We should prefer the plain meaning since that approach respects the words of Congress" and "avoid[s] the pitfalls that plague too quick a turn to the more controversial realm of legislative history."); *Ratzlaf* v. *United States*, 510 U.S. 135, 147-148

(1994) ("[W]e do not resort to legislative history to cloud a statutory text that is clear.").

2. Even if this Court were to consider legislative history in the face of an unambiguous statute, Section 844(h)(2)'s legislative history further refutes the court of appeals' conclusion that Congress meant to adopt an "in relation to" element that exists nowhere in the statutory text. To the contrary, the manner in which the two statutes have evolved confirms that the presence of an express relational element in Section 924(c)(1)(A), and the absence of one in Section 844(h)(2), reflects a deliberate congressional choice.

a. Section 924(c), the firearms statute, was originally enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213. In its initial form, the statute mandated at least one and no more than ten years of imprisonment for any person who

> carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States.

§ 102, 82 Stat. 1224 (18 U.S.C. 924(c)(2) (Supp. IV 1968)).

Section 844(h)(2), the explosives statute, was first enacted two years later, as part of the Organized Crime Control Act of 1970, Pub. L. No. 91-452, 84 Stat. 922. With the exception of the substitution of the words "an explosive" for "a firearm," its language was identical to that of the original Section 924(c)(2). See § 1102, 84 Stat. 957 (18 U.S.C. 844(h)(2) (1970)). A committee report accompanying the 1970 legislation confirms that the parallel language was intentional, stating that "Section 844(h) carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to

commit, or during the commission of, a Federal felony." *1970 House Report* 69.

In 1984, Congress redrafted the firearms statute, and made three changes to Section 924(c) that are pertinent here. First, Congress deleted the word "unlawfully" and added "and in relation to" after "during." 1984 Firearms Amendment § 1005(a), 98 Stat. 2138. Second, Congress limited Section 924(c) to cases involving a "crime of violence." *Ibid.*[1] Third, Congress mandated a five-year term of imprisonment for a first offense under Section 924(c), and it specified that the term of imprisonment may not "run concurrently with any other term of imprisonment including that imposed for the crime of violence in which the firearm was used or carried." § 1005(a), 98 Stat. 2138-2139.

A committee report prepared in connection with the 1984 Firearms Amendment contains a detailed discussion of the deletion of "unlawfully" and the addition of "and in relation to." See *1983 Senate Report* 314 n.10. In the view of the 1983 report's authors, the word "unlawfully" had been added to the original 1968 firearms statute "because of Congressional concerns that without it policemen and persons licensed to carry firearms who committed Federal felonies would be subject to additional penalties, even where the weapon played no part in the crime." *Ibid.* But, the report states, "persons who are licensed to carry firearms and abuse that privilege by committing a crime with the weapon, as in the extremely rare case of the armed police officer who commits a crime, are as deserving of punishment as [those] whose possession of the gun" was itself unlawful. *Ibid.*

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[1] In 1986, Congress expanded Section 924(c)'s coverage to encompass cases involving a "drug trafficking crime." Firearms Owners' Protection Act, Pub. L. No. 99-308 § 104(a)(2)(C), 100 Stat. 457.

In addition, the Senate Report notes that the new language requiring that the firearm be used or carried "'in relation to' the [underlying] crime would preclude [the firearms statute's] application in a situation where [the firearm's] presence played no part in the crime, such as a gun carried in a pocket and never displayed or referred to in the course of a pugilistic barroom fight." *Ibid.*

In 1985, the Department of Justice (Department) proposed a package of "minor or technical amendments" to the statute in which Section 844(h)(2) originally had been enacted. See 131 Cong. Rec. 14,166 (1985) (statement of Sen. Thurmond introducing S. 1236, 99th Cong., 1st Sess. (1985)). Section 83 of the proposed legislation would have modified Section 844(h) to require a mandatory and consecutive five-year term of imprisonment for any person who "uses fire or an explosive to commit, or carries an explosive during the commission of, any felony which may be prosecuted in a court of the United States." 131 Cong. Rec. at 14,173. In a section-by-section bill analysis that was placed in the *Congressional Record*, see *ibid.*, the Department explained that, under the proposed amendment,

> the carrying offense in Section 844(h) would be expanded to include all cases in which explosives are carried during the commission of a federal felony, not only those in which the carrying was "unlawful."

Id. at 14,183.

In 1988, Congress amended Section 844(h) in a manner that closely paralleled the Department's 1985 proposal. See Anti-Drug Abuse Amendments Act of 1988 (1988 Explosives Amendment), Pub. L. No. 100-690, Tit. VI, § 6474(b), 102 Stat. 4379. As the Department had

proposed, see 131 Cong. Rec. at 14,173, the 1988 Explosives Amendment deleted the word "unlawfully" without at the same time adding the words "and in relation to." § 6474(b)(1), 102 Stat. 4380. In addition, as the Department had proposed during the previous Congress, see 131 Cong. Rec. at 14,173, and as it had already done with the firearms statute, see 1984 Firearms Amendment § 1005(a), 98 Stat. 2138, Congress imposed a mandatory five-year term of imprisonment for a first offense under Section 844(h)(2), and directed that the term of imprisonment may not "run concurrently with any other term of imprisonment including that imposed for the felony in which the explosive was used or carried." 1988 Explosives Amendment § 6474(b)(2), 102 Stat. 4380.

No committee reports were prepared in connection with the 1988 Explosives Amendment. See 102 Stat. 4545. Senator Biden, however, the then-Chairman of the Judiciary Committee, drafted a section-by-section analysis of the Title that included the amendments to Section 844(h) "as a detailed statement in the *Record* of Congress' intent in enacting these provisions." 134 Cong. Rec. 32,692 (1988).[2] Addressing the proposed amendments to Section 844(h), Senator Biden stated that they

> would strengthen the offense * * * of using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted by the Comprehensive Crime Control Act of 1984 and the Firearms Owners' Protection Act of 1986 with respect to the parallel offenses of using or carrying a firearm during the commission of federal offenses. Presently, as a result of the above-ref-

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[2] Senator Biden's bill analysis is "the Senate Report" to which the court of appeals referred in its opinion. See Pet. App. 11a.

> erenced amendments to 18 U.S.C. 924(c), a person who uses a firearm to commit a bank robbery would be subject to harsher penalties than a person who committed the same offense using an explosive. There is no justification for this disparity.

134 Cong. Rec. at 32,700.[3]

b. The sequence and manner in which the two statutes were enacted and amended confirm that the absence of a relational element in Section 844(h)(2) reflects a deliberate congressional choice. Aside from the substitution of "an explosive" for "a firearm," Section 924(c)(2) and Section 844(h)(2) began with identical language. The 1988 Explosives Amendment tracked the 1984 Firearms Amendment in a number of respects, including the deletion of the word "unlawfully," the imposition of a mandatory five-year term of imprisonment for a first offense, and the requirement that the sentence for the use or carrying offense be served consecutively to all other sentences. But the most salient point here is that when it amended the explosives statute in 1988, Congress did *not* add the words "and in relation to" that it had added to the firearms statute just four years earlier. Pet. App. 28a (O'Scannlain, J., dissenting from denial of rehearing en banc).

The legislative record only confirms the significance of the current differences in wording between the two

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[3] In 1996, Congress enacted the current mandatory ten-year term of imprisonment for a first offense under Section 844(h). See Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, § 708(a)(3)(A), 110 Stat. 1296. Section 924(c) has been amended a number of times since 1984. See 18 U.S.C. 924 note (2000 & Supp. V 2005). In 1998, Congress redrafted Section 924(c)(1) and enacted the present graduated penalty structure. See Act of Nov. 13, 1998, Pub. L. No. 105-386, § 1(a)(1), 112 Stat. 3469.

statutes. The Senate Report prepared in connection with the 1984 Firearms Amendment reveals an understanding that, in the absence of an "unlawfully" or "in relation to" requirement, the statute could be applicable in situations where the weapon "played no part in the crime." *1983 Senate Report* 314 n.10; see *Muscarello* v. *United States*, 524 U.S. 125, 137 (1998) (stating that "Congress added the[] words ['and in relation to'] in part to prevent prosecution where guns 'played' no part in the crime."). The Department expressed a similar understanding in its 1985 bill analysis, noting that, absent the word "unlawfully," Section 844(h)(2) would apply to "*all cases* in which explosives are carried during the commission of a federal felony." 131 Cong. Rec. at 14,183 (emphasis added). The limited legislative history of the 1988 Explosives Amendment "does not specifically say why 'unlawfully' was struck, or why 'and in relation to' was not added," Pet. App. 11a, but what evidence there is from Senator Biden's statement affords no basis for discounting the significance of the omission of the "and in relation to" language. Senator Biden did not say that Congress's intent was to add an entirely unstated relational element, and, when read in context, his statement that the purpose of the amendments was "to bring [Section 844(h)(2)] in line with" the recent amendments to Section 924(c) was clearly a reference to the then-existing disparity in penalty rather than an expression of intent for the two statutes to be identical in every respect. 134 Cong. Rec. at 32,700.

D. The Court Of Appeals' Own Previous Decision In *Stewart* Does Not Warrant A Different Result

The Ninth Circuit made no attempt to identify a source in the statutory language for its holding that Sec-

tion 844(h)(2) contains an implicit relational element. Instead, it relied on *Stewart*, *supra*, a decision that construed an earlier version of the firearms statute, and extrapolated from *Stewart* that the current version of Section 844(h)(2) must contain a requirement that the statutory text omits. Pet. App. 8a-11a.

The court of appeals' analysis is flawed at every step. First, "[t]he starting point in discerning congressional intent is the existing statutory text, and not the predecessor statutes," *Lamie*, 540 U.S. at 534 (citation omitted), much less a predecessor version of a different statute. "And where," as here, "the statutory language provides a clear answer," the analysis "ends there as well." *Hughes Aircraft Co.* v. *Jacobson*, 525 U.S. 432, 438 (1999). All of those principles apply *a fortiori* in this Court, where *Stewart* has no special claim as circuit precedent.

Second, to the extent *Stewart* is relevant at all, it is equally plausible to view *Stewart*, and the congressional actions that followed it, as undermining the court of appeals' decision here. *Stewart* construed a different statute that was amended at a different time and in different ways, see pp. 19-23, *supra*, and did not purport to interpret Section 844(h). And if Congress's subsequent addition of the words "and in relation to" can shed light on the meaning of the pre-1984 version of the firearms statute, as the *Stewart* court determined that it can, see 779 F.2d at 540, then surely Congress's failure to add those very same words when it amended the explosives statute in 1988 suggests something about the meaning of current Section 844(h)(2). See *Rosenberg*, 806 F.2d at 1178 (stating that "Congress has not seen fit to modify [Section] 844(h) in the same manner" that it had modified

Section 924(c) by the time of the Ninth Circuit's decision in *Stewart*).

In fact, Congress's failure to add the words "and in relation to" when it amended Section 844(h) in 1988 is all the more telling in light of *Stewart* and *Rosenberg*. In 1985, *Stewart* held that in light of the 1984 amendments, the pre-1984 version of Section 924(c)(2)—which contained the word "unlawfully" but not the words "and in relation to," see 18 U.S.C. 924(c)(2) (1982)—was best understood as containing an implicit relational element. In 1986, the Third Circuit held that the pre-1988 version of Section 844(h)(2)—which also contained the word "unlawfully" but not the words "and in relation to," see 18 U.S.C. 844(h)(2) (1982)—"has no relational element." *Rosenberg*, 806 F.2d at 1179. And, faced with these "divergent decisions," Congress chose to delete from Section 844(h)(2) the word "unlawfully" *without* at the same time adding the words "and in relation to" that it had added to Section 924(c) only four years earlier. Pet. App. 28a (O'Scannlain, J., dissenting from denial of rehearing en banc). That contrast suggests that, whatever the merits of *Stewart*'s interpretation of Section 924(c), Congress thereafter had good reason to be explicit if it had wanted an "in relation to" requirement in Section 844(h)(2), and it declined to take that step.

Third, the method of analysis employed in *Stewart* is inconsistent with this Court's more recent precedents regarding statutory interpretation. The Ninth Circuit's decision in that case made no attempt to explain how its holding was consistent with the text of the governing statute. See, *e.g.*, *Lamie*, 540 U.S. at 534 ("The starting point in discerning congressional intent is the existing statutory text."); *Wells*, 519 U.S. at 490 (describing "a natural reading of the full text" as "the first criterion in

the interpretive hierarchy"); *United States* v. *Alvarez-Sanchez*, 511 U.S. 350, 356 (1994) ("When interpreting a statute, we look first and foremost to its text.") Moreover, subsequent opinions have reaffirmed that *Stewart*'s heavy reliance "upon the legislative history of an amendment to determine the scope of the pre-amendment statute [was] questionable." Pet. App. 31a n.3 (O'Scannlain, J., dissenting from denial of rehearing en banc). See, *e.g.*, *Jones* v. *United States*, 526 U.S. 227, 238 (1999) ("[S]ubsequent legislative history is a hazardous basis for inferring the intent of an earlier Congress.") (internal quotation marks and citation omitted); *Central Bank of Denver, N.A.* v. *First Interstate Bank of Denver, N.A.*, 511 U.S. 164, 185 (1994) ("[W]e have observed on more than one occasion that the interpretation given by one Congress (or a committee or Member thereof) to an earlier statute is of little assistance in discerning the meaning of that statute.") (citation omitted). Even if such evidence may properly be considered, *Stewart* acknowledged that the legislative history of the 1984 Firearms Amendment is "not entirely free of ambiguity," 779 F.2d at 540, and *Stewart*'s interpretation of that history is debatable. See *Rosenberg*, 806 F.2d at 1178 (disagreeing with *Stewart*'s conclusion that "the legislative history of the 1984 amendment 'strongly implie[d]' that the 'in relation to' phrase did not affect the scope of the statute as originally written" (quoting *Stewart*, 779 F.2d at 539-540)); see also pp. 20-21, *supra* (discussing the committee report upon which *Stewart* relied). Finally, even assuming that *Stewart* was correct that the firearms statute's "evident purpose * * * necessarily implies some relation or connection between the underlying criminal act and the use or possession of the firearm," 779 F.2d at 540, "the fact that a statute can be 'ap-

plied in situations not expressly anticipated by Congress does not demonstrate ambiguity. It demonstrates breadth.'" *Pennsylvania Dep't of Corr.* v. *Yeskey*, 524 U.S. 206, 212 (1998) (quoting *Sedima, S.P.R.L.* v. *Imrex Co.*, 473 U.S. 479, 499 (1985)).

For all of these reasons, *Stewart*'s interpretation of a long-superseded version of a different statute is entitled to little, if any, weight in assessing the meaning of current Section 844(h)(2). It most certainly cannot bear the case-dispositive significance the Ninth Circuit ascribed to it here. Pet. App. 11a-12a.

E. The Canon Against Absurdities Does Not Apply

Respondent relies (Br. in Opp. 13-15) on the canon against absurdities, which applies when a statute's text would lead to "patently absurd consequences." *United States* v. *Brown*, 333 U.S. 18, 27 (1948), such that "the absurdity and injustice of applying the provision to the case would be so monstrous, that all mankind would, without hesitation, unite in rejecting the application." *Sturges* v. *Crowninshield*, 17 U.S. (4 Wheat.) 122, 203 (1819) (Marshall, C.J.). That canon has no application here.

1. This Court has applied the canon against absurdities in interpreting ambiguous statutes that are susceptible to two or more interpretations because it is likely that Congress intended the non-absurd interpretation. See, *e.g.*, *Clinton* v. *City of New York*, 524 U.S. 417, 428-429 (1998); *United States* v. *Granderson*, 511 U.S. 39, 56 (1994). This Court has also read broad or general terms narrowly, or even on occasion recognized unstated exceptions, because it is unlikely that Congress foresaw an absurd application of general language, such as where a sheriff was prosecuted for obstructing the mails even

though he was executing a warrant to arrest the mail carrier for murder, or where a medieval law against drawing blood on the streets was to be applied against a physician who had come to the aid of a man who had fallen down in a fit. *Church of the Holy Trinity* v. *United States*, 143 U.S. 457, 460-461 (1892) (citing cases); see *Public Citizen* v. *United States Dep't of Justice*, 491 U.S. 440, 455 (1989).

2. Section 844(h)(2), it bears repeating, does not come into play until a person commits a "felony which may be prosecuted in a court of the United States." 18 U.S.C. 844(h)(2). The question, therefore, is whether it is "quite impossible [to believe] that Congress could have intended" to require an additional ten years of punishment for any person who commits a federal felony while simultaneously carrying an explosive, and that the "absurdity [of doing so] is so clear as to be obvious to most anyone." *Public Citizen*, 491 U.S. at 471 (Kennedy, J., concurring in the judgment).

To ask such a question is to answer it. There is nothing absurd about mandating severe punishment for any person who carries an explosive while committing another crime, and, at any rate, harshness of punishment alone is insufficient to render a statute's clear meaning absurd or ambiguous. *Estate of Cowart* v. *Nicklos Drilling Co.*, 505 U.S. 469, 483-484 (1992); see *Lamie*, 540 U.S. at 538 ("Our unwillingness to soften the import of Congress' chosen words even if we believe the words lead to a harsh outcome is longstanding."). Explosives are inherently dangerous, and "[t]he carrying of [one] during the commission of a crime greatly increases the risk of injury or death to others," especially given the high risk that explosives "may go off accidentally." Pet. App. 28a n.1 (O'Scannlain, J., dissenting from denial of

rehearing en banc); see Organized Crime Control Act of 1970, § 1101, 84 Stat. 952 (recognizing the "hazard to persons and property" posed by the "misuse and unsafe or insecure storage of explosive materials" in the statute that first enacted Section 844); *1970 House Report* 24 (same).

In addition, an explosive is a relatively unusual item for an individual to be carrying, and the number of situations in which there is a fully innocent explanation for doing so is smaller still. Congress could therefore reasonably have concluded that a defendant's act of carrying an explosive while simultaneously committing a felony is sufficiently likely to be connected to that felony to warrant dispensing with any requirement for the government to provide case-specific proof of a relationship between the two. Nor was it unforeseeable that the amended statute could be applicable to situations in which the explosive did not facilitate the commission of the underlying felony: The Department advised Congress in 1985 that the deletion of the word "unlawfully" would result in "the carrying offense in section 844(h) [being] expanded to include all cases in which explosives are carried during the commission of a federal felony." 131 Cong. Rec. at 14,183. Cf. *1983 Senate Report* 314 n.10 (recognizing that, absent an "unlawfully" or "in relation to" requirement, the firearms statute could be applicable in situations where the weapon "played no part in the crime").

Respondent does not appear to contend that there is anything "patently absurd" (*Brown*, 333 U.S. at 27) about requiring him to serve an additional period of imprisonment based on the fact that he was carrying the explosives found in the trunk of his car at the time he committed the underlying crime of lying about his name

to a United States customs inspector. Instead, respondent asserts that interpreting Section 844(h)(2) in accordance with its plain terms could authorize other, hypothetical, prosecutions that Congress may not have anticipated, such as a police officer being prosecuted for accepting a bribe while carrying his loaded service revolver, or a licensed explosives dealer being prosecuted for possessing explosives during an entirely unrelated customs offense. Br. in Opp. 13-15.

That argument fails for several different reasons. First, it is entirely plausible that Congress's primary purpose in amending Section 844(h)(2) in 1988 was to ensure that the statute would be broad enough to cover all situations in which its enhanced penalty is warranted, and that Congress was content to rely on the exercise of sound prosecutorial discretion to guard against the statute's overly expansive use. It is telling in this regard that respondent is unable to identify any actual prosecutions that resemble the hypothetical ones he posits.[4]

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[4] *United States* v. *Davis*, 202 F.3d 212 (4th Cir.) (Br. in Opp. 23), cert. denied, 530 U.S. 1236 (2000), did not involve a prosecution under Section 844(h)(2). Rather, that case involved the calculation of the proper base offense level under the Sentencing Guidelines for a defendant who had been convicted, *inter alia*, of maliciously damaging a dwelling within the special maritime or territorial jurisdiction of the United States. See *id.* at 214, 218-219; 18 U.S.C. 1363. Although the Fourth Circuit referred to the definition of "explosive" contained in 18 U.S.C. 844(j), it did so only because the Guidelines themselves contained no definition of that term. *Davis*, 202 F.3d at 218. Judge Michael dissented in *Davis*. In his view, "[e]xplosives blow things apart through the violent expansion of internal energy," and this fact precludes the term's application to the gunpowder contained inside a bullet. *Id.* at 221-223; but see 18 U.S.C. 844(j) (defining "explosive" for purposes of a number of provisions, including Section 844(h), as including "gunpowders"); 18 U.S.C. 845(a)(4) (generally exempting "small arms ammunition and components thereof" from coverage under

Second, this Court's decisions have stated that the absurd consequences canon is properly invoked to narrow broad statutory language in situations "where the words [of the statute] 'could not conceivably have been intended to apply' *to the case at hand*," not to other, hypothetical, ones. *Logan*, 128 S. Ct. at 484 (emphasis added) (quoting *Cabell* v. *Markham*, 148 F.2d 737, 739 (2d Cir.) (L. Hand, J.), aff'd, 326 U.S. 404 (1945)); accord *Sturges*, 17 U.S. (4 Wheat.) at 203 (stating that the canon applies in situations where "applying the provision to *the case* would be * * * monstrous") (emphasis added). There is no overbreadth doctrine that gives defendants whose own prosecution is far from absurd license to attack the statute based on absurd hypotheticals. Finally, given the inherently dangerous nature of explosives, Congress's decision to eliminate the word "unlawfully," 1988 Explosives Amendment § 6474(b)(1), 102 Stat. 4380, and the broad definition of explosives it chose for this particular statute, see note 4, *supra*, it is far from clear that even the two hypothetical applications of Section 844(h)(2) that respondent posits "would be, in a genuine sense, absurd," such that "it is quite impossible to imagine that Congress could have intended the result." *Public Citizen*, 491 U.S. at 470-471 (Kennedy, J., concurring in the judgment).

Although he does not directly assert that such a regime is absurd, respondent also suggests that it "makes no sense" for Congress to have "impose[d] an identically harsh penalty for the coincidental carrying of an explosive" as "for the *use* of explosives to commit a felony." Br. in Opp. 13 (citing 18 U.S.C. 844(h)(1)). But it is Con-

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Chapter 40 of Title 18, United States Code, 18 U.S.C. 841 *et seq.*, but providing that this carve-out "shall not apply to" certain specified provisions, including Section 844(h)).

gress that "has primary responsibility for making the difficult policy choices that underlie any criminal sentencing scheme," and courts "do not sit as a 'superlegislature' to second-guess these policy choices." *Ewing* v. *California*, 538 U.S. 11, 28 (2003) (opinion of O'Connor, J.); see *Gore* v. *United States*, 357 U.S. 386, 393 (1958) ("Whatever views may be entertained regarding severity of punishment, whether one believes in its efficacy or its futility, these are peculiarly questions of legislative policy.") (citation omitted). Congress's decision to omit a relational element in Section 844(h)(2) may reflect only a desire not to saddle the government with an additional element of proof once it has shown the carrying of an explosive in temporal proximity with the commission of a federal felony. Nor is it clear that the punishments for use and carrying offenses will invariably be the same. While a first offense under Section 844(h)(2) for carrying an explosive requires a ten-year sentence, a person who uses or attempts to use an explosive to "damage[] or destroy[]" federal property, 18 U.S.C. 844(f)(1) (Supp. V 2005), or any real or personal property "used in * * * any activity affecting interstate or foreign commerce," 18 U.S.C. 844(i), is subject to at least five and up to 20 years of imprisonment, with the ranges being increased to seven to 40 years of imprisonment if a person is injured, and to 20 years to life imprisonment or the death penalty if a person is killed.

F. The Rule Of Lenity Does Not Apply

Contrary to respondent's assertion (Br. in Opp. 15), the rule of lenity does not apply in this case. That "maxim of statutory construction," *Taylor* v. *United States*, 495 U.S. 575, 596 (1990), is reserved for cases involving a "grievous ambiguity" in the statutory text

such that, "after seizing everything from which aid can be derived, . . . [the Court] can make no more than a guess as to what Congress intended." *Muscarello*, 524 U.S. at 138-139 (internal quotation marks and citations omitted). Rule of lenity concerns are also attenuated where, as here, the provision in question does not demarcate a line between legally innocent and criminally culpable conduct, but instead involves an offense that requires, as an element, the commission of a different felony. Cf. *Arthur Anderson LLP* v. *United States*, 544 U.S. 696, 703-704 (2005) (discussing situation where "the act underlying the conviction * * * is by itself innocuous" and "not inherently malign").

Respondent has not identified any language in Section 844(h)(2) that he claims is ambiguous. Rather, he asserts that it would be "rational to interpret the statute as requiring the government prove a relationship between the carrying of the explosives and the charged [felony]." Br. in Opp. 15. While Congress might have rationally adopted such a requirement, it is not rational to read such a requirement into a statute that contains no textual or other basis for such an interpretation. And "[t]he mere possibility of articulating a narrower construction * * * does not by itself make the rule of lenity applicable," *Smith*, 508 U.S. at 239, because "[t]he rule comes into operation at the end of the process of construing what Congress has expressed, not at the beginning as an overriding consideration of being lenient to wrongdoers." *Gozlon-Peretz* v. *United States*, 498 U.S. 395, 410 (1991) (quoting *Callanan* v. *United States*, 364 U.S. 587, 596 (1961)). Section 844(h)(2) is clear and unambiguous, and supplying an element that Congress itself omitted goes well beyond the rule's limited role.

CONCLUSION

The judgment of the court of appeals should be reversed.

Respectfully submitted.

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JANUARY 2008

RESPONDENT'S BRIEF

74

6

No. 07-455

50pgs

FILED

FEB 21 2008

OFFICE OF THE CLERK
SUPREME COURT, U.S.

In The

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

v.

AHMED RESSAM,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

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QUESTION PRESENTED

Section 844(h)(2) of Title 18, United States Code, prescribes a mandatory ten-year term of imprisonment for any person who "carries an explosive during the commission of any" federal felony, and "explosive" is defined in Section 844(j) to include many common and legal substances, like gasoline and gunpowder, so long as they "may cause an explosion." The question presented is whether Section 844(h)(2) applies to a person who "carries" such an "explosive" during the commission of a felony to which the "explosive" is completely unrelated.

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STATEMENT

Respondent, Ahmed Ressam, entered the United States on December 14, 1999, by car ferry at Port Angeles, Washington, where he was contacted by customs inspectors. Respondent provided false information regarding his identity and citizenship. His demeanor aroused suspicion and he was referred for secondary inspection. His car was searched and discovered hidden in its trunk were the components of a bomb, including explosives, detonators, timing devices, and other items. Pet. App. 4a. Respondent was arrested and the government initiated an intensive investigation. That investigation bore significant fruit and Respondent was ultimately charged on February 14, 2001, in a nine-count Second Superseding Indictment. J.A. 18-23.

The centerpiece of the Indictment was Count 1, which alleged conspiracy to commit an act of terrorism in violation of 18 U.S.C. § 2332b(a)(1)(B). Five counts alleged the violation of laws related to explosives: placing an explosive in proximity to a terminal (Count 2); smuggling explosives (Count 6); transporting explosives without a permit (Count 7); possession of an unregistered destructive device (Count 8); and carrying an explosive during the commission of a federal felony (Count 9). The three remaining counts centered on Respondent's attempt to enter the United States under false pretenses: possession of false identification (Count 3); use of a fictitious name (Count 4); and making a false statement to a customs

official (Count 5). The government chose Count 5 as the felony underlying the charge brought in Count 9.

Respondent was tried before a jury in Los Angeles during March and April 2001. At trial, Respondent moved for a judgment of acquittal on Count 9, arguing that the government presented no evidence that would support a finding that the carrying of the explosives facilitated the false statement charge in Count 5. J.A. 62-63. The district court denied the motion for a judgment of acquittal. J.A. 67.

The jury convicted Respondent on all counts, but sentencing was delayed as a result of his decision to cooperate. His cooperation was "extensive," Pet. App. 6a, but ultimately stopped, and on July 27, 2005, the district court sentenced Respondent to a total of 22 years imprisonment. J.A. 74. The government appealed the sentence and Respondent cross-appealed, challenging the sufficiency of the evidence on Count 9.

The court of appeals did not address the sentencing question, both because it agreed with Respondent that the conviction on Count 9 could not stand, and because it felt the district court should, on remand, have the opportunity to take into account sentencing law emerging from *United States v. Booker*, 543 U.S. 220 (2005). Pet. App. 13a-14a.

In vacating the conviction on Count 9, the court of appeals observed that "the government offered no evidence that Ressam's carrying the explosives in any way facilitated his falsifying the customs declaration

form." Pet. App. 7a. Noting that absence of proof, the court of appeals went on to hold that "[i]t is not enough for the government to prove that Ressam lied *because* he was smuggling explosives in the trunk of his car. Rather, the government must demonstrate that the explosives aided the commission of the underlying felony in some way." Pet. App. 13a (emphasis in original).

Certiorari was sought and granted on the question of whether Title 18 U.S.C. § 844(h)(2) requires a relation or connection between the underlying felony and the carried explosives.

SUMMARY OF ARGUMENT

Section 844(h)(2) mandates a ten-year sentence of imprisonment for any person who "carries an explosive during the commission of any felony which may be prosecuted in a court of the United States." The statute must be read to require that the explosives carried bear a relationship to the underlying felony. This conclusion flows from the text of Section 844(h)(2) itself, the statutory scheme of which it is a part, the history and purpose of the statute, and from long-standing principles of statutory construction.

Without the imposition of a relational requirement, Section 844(h)(2) would inflexibly mandate a ten-year sentence for the legal, commonplace, safe possession of explosives during the commission of unrelated and comparatively non-serious offenses.

Because the statute employs the terms "explosive," "any [federal] felony," and "carries," all of which are remarkably broad, the need for a relational requirement is of more than academic interest. Contrary to the government's claim that an explosive is a relatively unusual item, the innocent carrying of which is more unusual yet, Govt. Br. at 30, the definition of "explosive" includes a host of common items lawfully possessed by many people in many situations, substances like gasoline and fertilizer. Equally expansive is the range of conduct covered by federal felony statutes, and the term "carries" extends to items conveyed in the locked trunk of a vehicle. In the face of the statute's broad sweep, the government's contention that no relationship between the explosives and the felony need exist to trigger the statute's mandatory penalty offends common sense and should not be accepted when, as here, the words can readily be construed in a far more sensible way.

The statutory scheme of Section 844 reinforces the necessity of a causal relationship between the carried explosives and the underlying felony. Section 844 was adopted to penalize the misuse of explosives. Its subsections proscribe using explosives to kill, injure, intimidate, damage property, and make threats, under circumstances that implicate federal jurisdiction. It is wholly inconsistent with the full text of Section 844 that Section 844(h)(2)'s mandatory penalties would apply to the lawful possession of explosives simply because they were carried during the commission of an incidental felony.

The historical development of Section 844 further demonstrates that its purpose is to punish only the misuse of explosives. Section 844(h)(2) first appeared as part of the Organized Crime Control Act of 1970, a bill that was enacted, in part, for the purpose of strengthening and expanding criminal penalties for "the intentional misuse of explosives." Congress took care to differentiate between the use and misuse of explosives, crafting regulations concerning their lawful transportation and storage, while enhancing punishments where carried or used for illegal purposes. The relationship between the explosives and the underlying felony in Section 844(h)(2) is consistent with this scheme, while the government's view that the statute's penalties reach the lawful carrying of explosives during an incidental felony is not.

The government presses a literal reading of Section 844(h)(2), one which would require no relationship between the carried explosive and the underlying felony and one it concedes risks "overly expansive use" if adopted. That risk is not readily apparent in this case where Respondent carried explosives and planned an act of terrorism. But the government's unusual charging decision, linking Section 844(h)(2) to the completely unrelated felony of making a false declaration to a customs official, does not disguise the government's unreasonable construction of the statute's reach. Without a nexus between the explosive and the underlying felony, there is no logical limit to its application. In the government's view, its harsh penalties could apply even where the

explosives were carried lawfully, safely, and to no relevant effect as to the underlying felony.

The government's position that no relationship at all need exist between carrying the explosives and the predicate felony under Section 844(h)(2) ignores the definition and meaning of key terms used in Section 844(h)(2) and even suggests this Court should treat as surplusage words that do not fit with its theory. And at no point does the government attempt to harmonize its expansive interpretation of Section 844(h)(2) with the full text and structure of the explosives statutes. The government's approach is inconsistent with rulings of this Court which regularly caution against attempts to interpret statutes by construing words and phrases in isolation; requiring instead consideration of the whole statutory text, the statute's structure, its purpose, and consideration of other authorities that might inform the analysis. Utilizing this well-established holistic approach to the question presented leads inescapably to the conclusion that Section 844(h)(2) requires that the explosives be carried in relation to the underlying felony.

ARGUMENT

I. Section 844, Read as a Whole, and In Light of Its Purpose and History, Requires a Relationship Between the Carrying of Explosives and the Predicate Felony.

Applying the well-established principle that "[s]tatutory construction is a 'holistic endeavor,'" *Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 60 (2004) (quoting *United Sav. Assn. of Tex. v. Timbers of Inwood Forest Assocs., Ltd.*, 484 U.S. 365, 371 (1988)), the text, its context, purpose, and history all support the conclusion that implicit in 18 U.S.C. § 844(h)(2) is the element that there be a relationship between the explosives and the underlying felony.

A. The Text of Section 844(h)(2) Requires That the Carrying of Explosives Be Related to the Underlying Felony.

Statutory interpretation "begins with the language of the statute." *Leocal v. Ashcroft*, 543 U.S. 1, 8 (2004) (citing *Bailey v. United States*, 516 U.S. 137, 144 (1995)). This Court "consider[s] not only the bare meaning of the word, but also its placement and purpose in the statutory scheme." *Bailey*, 516 U.S. at 145. An examination of 18 U.S.C. § 844(h)(2)'s text and surrounding provisions clarifies that its heavy mandatory minimum penalty only attaches to situations where there is a connection between the explosives and the underlying felony.

1. The key terms of Section 844(h)(2) – "explosive," "carries," and "[federal] felony" – are so broad independently that when read together they "most naturally suggest[ ]," *Leocal*, 543 U.S. at 9, there must be a relationship between them.

For one, the term "explosive" as defined for purposes of Section 844(h)(2) is not limited to "unusual item[s]," Govt. Br. 30, but instead encompasses common materials that people use in their daily lives and professions:

> gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. § 844(j) (reproduced at Resp. App. 6a).[1]

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[1] The cross reference to 18 U.S.C. § 232 provides the following definition of "explosive or incendiary device":

> (A) dynamite and all other forms of high explosives,
> (B) any explosive bomb, grenade, missile, or similar

(Continued on following page)

Courts have recognized, and other statutory provisions confirm, that this definition includes within its reach everyday items such as gasoline, ammunition, fertilizer, natural gas, and fireworks. *See, e.g., United States v. Ramsey*, 726 F.2d 601, 603 (10th Cir. 1984) (holding that gasoline constitutes an explosive under Section 844(j)); *United States v. Davis*, 202 F.3d 212, 218-19 (4th Cir. 2000) (finding gunpowder in ammunition to be "gunpowder" and thus falling within Section 844(j)'s definition of "explosive")[2]; 18 U.S.C. § 844(g)(2)(A) (specifically exempting ammunition in certain circumstances from explosives that cannot be possessed in airports);

> device, and (C) any incendiary bomb or grenade, fire bomb, or similar device, including any device which (i) consists of or includes a breakable container including a flammable liquid or compound, and a wick composed of any material which, when ignited, is capable of igniting such flammable liquid or compound, and (ii) can be carried or thrown by one individual acting alone.

18 U.S.C. § 232.

[2] While the government correctly points out that the defendant in *Davis* had not been charged with violating Section 844, Govt. Br. 31 n.4, the Court did interpret Section 844(j) to include ammunition. 202 F.3d at 219. Because the Guidelines section at issue, U.S.S.G. § 2K1.4, did not define "explosives," the Fourth Circuit, noting that U.S.S.G. § 2K1.3 specifically incorporated Section 844(j) to define "explosives," looked to Section 844(j). *Id.* The court reasoned that ammunition in a loaded gun is an explosive because it contains "gunpowder," something specifically identified in Section 844(j), and also because "'shooting' requires an explosion to expel a projectile from a firearm." *Id.*

18 U.S.C. § 845(a)(4) (which generally excepts the title from application to "small arms ammunition" but specifically does not except it from subsections 844(d) through (i)); *United States v. Nettles*, 476 F.3d 508 (7th Cir. 2007) (assuming without deciding that ammonium nitrate, a fertilizer, is an explosive under Section 844); *United States v. Hepp*, 656 F.2d 350, 352 (8th Cir. 1981) (holding random mixture of air and methane gas constitutes an explosive under Section 844); *United States v. Shearer*, 479 F.3d 478, 482 (7th Cir. 2007) (holding that fireworks are explosives for purposes of U.S.S.G. § 2K1.3, which adopts the definition of explosives found in Section 844(j)).

The predicate offense under Section 844(h)(2) – "any felony which may be prosecuted in a court of the United States" – is also remarkably broad. In general, a felony includes any offense punishable by more than one year. *See* 18 U.S.C. § 3559(a). Federal felonies range from possessing a counterfeit twenty-dollar bill, 18 U.S.C. § 472, and making a false statement, 18 U.S.C. § 1001, to murder, 18 U.S.C. § 1111, and terrorism, 18 U.S.C. § 2332b.

Another potentially expansive statutory term is "carries." In the context of carrying firearms under Section 924(c), Title 18, an offense punished by a mandatory minimum of not less than five years imprisonment, this Court has interpreted "carries" to apply not only where the firearms are carried on the person, but also where "a person who knowingly possesses and conveys firearms in a vehicle, including in the locked glove compartment or trunk of a car,

which the person accompanies." *Muscarello v. United States*, 524 U.S. 125, 126-27 (1998).[3]

The breadth of these three terms read in isolation raises a question of how they are most appropriately understood in relation to each other when they are read together in the phrase "carries an explosive during the commission of any [federal] felony." This Court has "often wisely applied" the rule that "[a] word is known by the company it keeps" in instances "where a word is capable of many meanings in order to avoid the giving of unintended breadth to the Acts of Congress." *Dolan v. United States*, 546 U.S. 481, 486 (2006) (internal quotation marks omitted). Here, absent a nexus between the terms and any limitation that the explosives be carried unlawfully, *see infra*, Sec. I.B., the statute punishes what would otherwise be innocent conduct. *Cf. Arthur Andersen LLP v.*

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[3] Because this Court relied on the required relationship between the firearms and predicate felony when interpreting "carries" in Section 924(c), the government's reading of Section 844 would compel the conclusion that "carries" has a more narrow meaning in Section 844(h)(2) than it does in Section 924(c). *See Muscarello*, 524 U.S. at 137 ("Once one takes account of the words 'during' and 'in relation to,' it no longer seems beyond Congress' likely intent, or otherwise unfair, to interpret the statute as we have done."). The better common sense reading of Section 844(h)(2) as requiring a relationship between the explosives and the felony, allows "carries" to mean the same thing in both sections. Indeed, it is unlikely Congress intended two different meanings for the word "carries" and far more likely that Congress intended a nexus requirement exist in both provisions.

United States, 544 U.S. 696, 703 (2005) (exercising restraint in assessing the reach of a federal statute "where the act underlying the conviction . . . is by itself innocuous").

The practical consequence of reading the statute without a relationship is that individuals lawfully carrying explosives in connection to their work or hobbies, who happen simultaneously to commit unrelated possession and status offenses, are subject to the same mandatory minimum ten-year sentence enhancement as those who carry explosives to aid the commission of a felony. For example, under the government's reading, the statute applies to someone employed by a commercial demolition company, or with an avalanche control team in the mountain passes, or with an explosives manufacturer, or as a farmer or law enforcement officer, who carries explosives as part of his everyday work, and who simultaneously possesses a counterfeit twenty-dollar bill, an unauthorized money order, or unauthorized food stamps, in violation of 18 U.S.C. § 472, 18 U.S.C. § 500, and 7 U.S.C. § 2024, respectively. And, as the government stated at oral argument in the Ninth Circuit, its interpretation would apply to a licensed dynamite practitioner carrying dynamite who, while crossing the Canadian border into Washington, lied about carrying diamonds. *See* Br. in Opp. 14. Similarly, an employee or employer who willfully failed to pay child support (18 U.S.C. § 228), evaded taxes (26 U.S.C. § 7201), or knowingly employed illegal aliens

(8 U.S.C. § 1324(a)(3)) is also within the statute's ambit as interpreted by the government.

Indeed, if no relationship is required, the statute applies to a person who in her car carries a can of gasoline to a stranded friend, while at the same time committing one of the possessory or status offenses described above. And it applies to the farmer who, while committing a possessory or status offense, also happens to carry home from the feed store some ammonium nitrate, commonly used as a fertilizer. These few examples illustrate why common sense compels the conclusion that these three broad terms when read together "most naturally suggest[]," *Leocal,* 543 U.S. at 9, that there must be a relationship between them. "[T]here is no canon against using common sense in construing laws as saying what they obviously mean." *Roschen v. Ward*, 279 U.S. 337, 339 (1929).

2. The last sentence of Section 844(h) further supports the necessity of a relational element: "nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that imposed for the felony *in which* the explosive was used or carried." Section 844(h) (reproduced at Resp. App. 5a-6a) (emphasis added). Notably, the text does not say "during which." Instead, it explicitly requires a relationship – and more than a coincidental one – between the felony and the explosives.

3. While the text of Section 844(h)(2) establishes that a relational element is necessary, the context similarly supports the requirement of a nexus. *See, e.g., Owasso Indep. Sch. Distr. v. Falvo*, 534 U.S. 426, 434 (2002) (looking at other statutory sections in interpreting statute and citing *Davis v. Michigan Dept. of Treasury*, 489 U.S. 803, 809 (1989) ("It is a fundamental canon of statutory construction that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.")).

Reading the two subsections of Section 844(h) together shows that they form a coherent whole by punishing both the actual and the intended misuse of explosives during the commission of a felony. Section 844(h)(1) imposes a mandatory ten-year term of imprisonment on anyone who actually "uses . . . an explosive to commit any felony which may be prosecuted in a court of the United States." 18 U.S.C. § 844(h)(1). Section 844(h)(2) then repeats the verb "commit" to ensure that those who intended to use explosives "during the commission of" a felony, but were interrupted or otherwise dissuaded, also receive an enhanced punishment. That is, read naturally in light of Section 844(h)(1), this provision seeks to punish those who are carrying explosives for a purpose related to the federal crime being committed but do not actually use them. The clear objective of both provisions is to punish the *misuse* of explosives. Had Congress intended Section 844(h)(2) to accomplish the radically different goal of punishing the coincidental

carrying of explosives while committing any unrelated felony, it would be surprising at best to see it intertwined with Section 844(h)(1)'s identical ten-year penalty for using an explosive during a felony.

That it is the *misuse* of explosives that is the common subject of the crimes addressed in other provisions of Section 844 provides additional textual support that Section 844(h)(2) requires a relationship between the explosives carried and the underlying felony.[4] For example, Section 844(d) proscribes actual or attempted transporting or receiving of "any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property." Resp. App. 2a-3a. Section 844(e) prohibits bomb threats. Resp. App. 3a. Section 844(f) punishes someone who "maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive." Resp. App. 3a-4a. Section 844(i) does the same for those damaging, or attempting to damage, "any building, vehicle or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce." Resp. App. 6a.

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[4] The sole exception is Section 844(g), which addresses special concerns about the possession of explosives on federal property. Resp. App. 4a-5a.

Read together, the many subsections of Section 844 penalize the misuse of explosives, further demonstrating that Section 844(h)(2) requires a nexus between the explosives and the underlying felony.

B. Section 844(h)(2)'s History and Purpose Accord With the Text and Confirm There Must Be a Relationship Between the Explosives and the Felony.

Any remaining doubt that the statute's scope was intended to enclose only the related carrying of explosives is dispelled by the statutory history and purpose.

1. Two amendments to the original Section 844 support the conclusion that there must be a relationship between the explosives and the underlying felony. First, in 1988, Congress deleted the term "unlawfully" that had previously limited Section 844(h)(2) to sanctioning those who "carrie[d] an explosive *unlawfully* during the commission of any [federal] felony." Pet. App. 33a; *see* Anti-Drug Abuse Amendments Act of 1988, Pub. L. No. 100-690, Tit. VI, § 6474(b)(1), 102 Stat. 4379-4380. In doing so, Congress must have understood the statute to include some other limitation on the scope of conduct covered by the otherwise broad terms. Absent such an understanding, the amendment would have been quite radical – sweeping within its purview entirely innocent conduct. If Congress had made such a dramatic change, one would expect more debate at the time as

well as more explicit language in the statute. *See Koons*, 543 U.S. at 63 (citing *Church of Scientology of Cal. v. IRS*, 484 U.S. 9, 17-18 (1987) ("All in all, we think this is a case where common sense suggests, by analogy to Sir Arthur Conan Doyle's 'dog that didn't bark,' that an amendment having the effect petitioner ascribes to it would have been differently described by its sponsor, and not nearly as readily accepted by the floor manager of the bill.")).

Subsequently, in 1994, Congress amended Section 844 to add Section 844(m), which expressly prohibits conspiring to violate Section 844(h): "[a] person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20." *See* Violent Crime Control and Law Enforcement Act of 1994, Pub. L. No. 103-322, § 110518(b), 108 Stat. 2020. There is little question that one can conspire to carry explosives to be used in a felony. *Cf. United States v. McAuliffe*, 490 F.3d 526 (6th Cir. 2007) (upholding convictions for using fire to commit mail fraud in violation of Section 844(h)(1) and conspiring to use fire to commit mail fraud in violation of Section 844(m)). In contrast, it is not a criminal conspiracy to agree to do something that is lawful. If Section 844(h)(2) is read as the government suggests, however, the latter is precisely what Section 844(m) sanctions.

2. Respondent's reading of the statute "also enjoys the virtue of serving the evident Congressional purpose." *Johnson v. United States*, 529 U.S. 694, 708 (2000). The purpose of the Organized Crime Control

Act of 1970, Pub. L. No. 91-452, 84 Stat. 922, of which Section 844(h)(2) was a part, was to punish only the misuse of explosives and not the coincidental carrying of explosives:

> The Congress hereby declares that the purpose of this title [Title XI] is to protect interstate and foreign commerce against interference and interruption by reducing the hazard to persons and property arising from misuse and unsafe or insecure storage of explosive materials. *It is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, storage, or use of explosive materials for industrial, mining, agricultural, or other lawful purposes,* or to provide for the imposition by Federal regulations of any procedures or requirements other than those reasonably necessary to implement and effectuate the provisions of this title.

Pub. L. No. 91-452, § 1101, 84 Stat. 952 (emphasis added).

As the purpose indicates, Title XI of the Act, the explosives title, was enacted both to regulate explosives and impose criminal sanctions on the misuse of explosives. To this end, Congress enacted two different definitions of "explosive": one to govern the regulatory aspect of the title, Section 841(d), and another to address the malicious use of explosives, Section 844(j). The regulatory definition is limited to "any chemical compound mixture, or device, *the primary or*

common purpose of which is to function by explosion." 18 U.S.C. § 841(d) (emphasis added). This definition was specifically crafted to exclude "commonly used mixtures, such as gasoline and ammonium nitrate, a fertilizer, from interstate *regulation* as explosives." *United States v. Lorence*, 706 F.2d 512, 515 (5th Cir. 1983) (emphasis in original).

In contrast with the narrow regulatory definition, Congress enacted a much broader definition of explosives to "deal with the malicious use of explosives" set forth in Sections 844(d) through (i). *Lorence*, 706 F.2d at 515; *supra*, Sec. I.A. These different definitions demonstrate Congress did not want to interfere with the legal use of explosives such as use or carrying by commercial demolition workers or avalanche control crews. The only interpretation of Section 844(h)(2) that avoids such interference is one limited in application to related contemporaneous carrying.

II. The Legislative History of Section 844(h)(2) Is Consistent With Interpreting the Statute to Sanction the Carrying of Explosives Only When Related to an Underlying Felony.

What little legislative history there is accords with the conclusion compelled by the statutory terms, history, and purpose that Section 844(h)(2) requires explosives to be more than coincidentally related to the predicate felony.

Section 844(h) and the rest of Title XI of the Organized Crime Control Act of 1970 (codified as 18 U.S.C. §§ 841-48) were a "respon[se] to a widespread national concern that existing Federal and State sanctions and prohibitions over the use, possession, and transportation of explosives [were] inadequate" in light of "[b]ombings and the threat of bombings [that] ha[d] become an ugly, recurrent incident of life in the cities and on campuses throughout our Nation." H.R. Rep. No. 91-1549 (1970), *as reprinted in* 1970 U.S.C.C.A.N. 4007, 4013. Congress "combine[d] the regulatory approach to the distribution and storage of explosives with strengthened and expanded criminal prohibitions that apply to the *intentional misuse* of explosives." *Id.* (emphasis added). The role of Section 844 was specifically to "set[ ] the penalties for violation of the regulatory provisions of this chapter and create[d] certain offenses pertaining to the *unlawful use* of explosives." *Id.* at 4045 (emphasis added).

As discussed above, while Congress wanted to sanction the misuse of explosives, it sought to do so in a way that did not interfere with the lawful use of explosives. *See supra,* Sec. I.E. Nothing in the statute indicates Congress intended to punish the coincidental carrying of explosives while simultaneously committing an unrelated felony, let alone do so with a harsh and inflexible mandatory minimum sentence.

As the Ninth Circuit recognized in its decision below, in furtherance of its broad effort to regulate and sanction the misuse of explosives, Congress

modeled Section 844(h) on Section 924(c), which had been enacted as part of the Gun Control Act of 1968, Pub. L. No. 90-618, 82 Stat. 1213, 1224. Pet. App. 9a; Govt. Br. 19. When enacted the only difference between Section 844(h) and Section 924(c) was that the former addressed "explosive" and the latter "firearm." Pet. App. 33a; Resp. App. 9a.

While the legislative history of Section 924(c), like that for Section 844(h), is thin, as the Ninth Circuit correctly concluded in *United States v. Stewart*, 779 F.2d 538 (9th Cir. 1985), it supports the conclusion that when enacting Section 924(c), Congress intended the carrying of firearms to be related to the predicate felony. Specifically noting the sparse legislative history from Section 924(c)'s enactment, the Ninth Circuit looked to the legislative history at the time it was amended. *Id.* at 539-40. The court concluded that the legislative history "strongly implies that the 'in relation to' language did not alter the scope of the statute, explaining that 'the [original] section was directed at persons who chose to carry a firearm as an offensive weapon for a specific criminal act.'" *Id.* at 539 (citing S. Rep. No. 225, 98th Cong., 1st Sess. at 314 n.10 (1983), *reprinted in* 1984 U.S. Code Cong. & Ad. News 3182, 3490-92). From the conclusion that Congress believed the original version of Section 924(c) required a relationship between the carrying of firearms and the predicate felony, it is not a long leap to the conclusion that two years later, when Congress modeled its explosives statute on 924(c), it intended a similar relational element.

III. The Government's Contention That Section 844(h)(2) Does Not Require a Relationship Between the Carrying of Explosives and the Predicate Felony Does Not Comport With a Common Sense Reading of the Statute.

1. The government concedes that under its interpretation the statute is subject to "overly expansive use." Govt. Br. 31. The government surmises that Congress intended to rely on prosecutorial discretion to protect against improper overreaching. *Id.* But "[i]t is no answer to say that the statute would not be applied in such a case." *Keyishian v. Bd. of Regents of Univ. of State of N.Y.*, 385 U.S. 589, 599 (1967). *See also Baggett v. Bullitt*, 377 U.S. 360, 373 (1964) ("It will not do to say that a prosecutor's sense of fairness and the Constitution would prevent a successful . . . prosecution for some of the activities seemingly embraced within the sweeping statutory definitions."); *United States v. Wells*, 519 U.S. 482, 512, n.15 (1997) (Stevens, J., dissenting) ("[T]he liberty of our citizens cannot rest at the whim of an individual who could have a grudge or, perhaps, just exercise bad judgment."). Reliance on prosecutorial discretion is of particular concern here where the penalty – a mandatory minimum ten-year term – removes the

judiciary's ability to mitigate prosecutorial overreaching.[5]

It makes far more sense that Congress safeguarded individuals against the overly expansive use of this provision by limiting its application to situations where there is a relationship between the carrying of explosives and the underlying felony. This better interpretation of the statute does not leave the government without tools to sanction those who misuse explosives. In Respondent's case, for example, the government could have chosen to charge the Section 844(h)(2) violation in connection with the conspiracy to commit terrorism count (Count 1) rather than the false statement count (Count 5). *See* Br. in Opp. 5-6. If it had done so, this Court would have no issue to resolve because the parties do not dispute that the evidence was sufficient to prove a relationship between the carrying of explosives and

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[5] Indeed, the mandatory minimum sentence makes this statute an effective tool in plea negotiations even if it is not seen in actual counts of conviction. *See, e.g.*, Ronald F. Wright, *Trial Distortion and the End of Innocence in Federal Criminal Justice*, 154 U. PA. L. REV. 79, 153 (2005) (noting that "[m]andatory minimum sentence laws exert a powerful pull on plea negotiations, because a prosecutor's promise not to file (or to dismiss) charges that carry a mandatory minimum penalty can create enormous incentives to plead guilty"); Stephen J. Schulhofer, *Rethinking Mandatory Minimums*, 28 WAKE FOREST L. REV. 199, 202 (1993) (noting that "[m]andator[y] [minimum sentences] then become little more than a bargaining chip, a 'hammer' which the prosecutor can invoke at her option, to obtain more guilty pleas under more favorable terms").

the terrorism charge. *See id.* And in other cases, ample avenues remain to punish the misuse, or attempted misuse, of explosives. *See, e.g.*, Section 844(d)-(f), (i), as discussed, *supra*.

2. The government's struggle to conform its interpretation of Section 844(h)(2) with the text is apparent in its alternative suggestions regarding the words "during the commission of." The government's first suggestion, that the words are roughly synonymous with "during any felony" and that the surplusage should be tolerated, Govt. Br. 15, is inconsistent with this Court's admonition that "[j]udges should hesitate to treat statutory terms in any setting as surplusage, particularly when the words describe an element of a crime." *Jones v. United States*, 529 U.S. 848, 857 (2000) (citing *Ratzlaf v. United States*, 510 U.S. 135, 140-41 (1994)). It is also a strained reading of the statute. It is not any more "normal" to say "during the commission of any felony" than to say "during any felony." *See* Govt. Br. 15-16. Instead, "during the commission of any felony" is best read as an effort to repeat the verb "commit" from Section 844(h)(1) and, like (h)(1), sanction the misuse of explosives.

The government's next suggestion for these words indicates it believes the statute does contain an implicit nexus requirement, just a different one than what Respondent identifies. Specifically the government posits the words "during the commission of" "confirm that it is the defendant – rather than some other individual – who must commit the underlying

felony 'during' which the explosive is carried." Govt. Br. 16. These words, however, do not accomplish this task. What they do confirm is that this provision punishes the misuse of explosives.

3. Finally, the government's reliance on amendments to Section 924(c) and Congressional inaction on Section 844(h)(2) is not sufficient to undermine the clear textual indications that Section 844(h)(2) requires a relationship between the carrying of explosives and the predicate felony.

To be sure, Section 924(c) now explicitly limits its application to those who carry firearms "during and in relation to" the predicate offense. Pet. App. 34a. But the mere fact that Section 924(c) contains these words and Section 844(h)(2) does not shows only that "Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning." Govt. Br. 20 in *United States v. Santos*, No. 06-1005 (citing *Limtiaco v. Camacho*, 127 S. Ct. 1413, 1419 (2007) (holding that "tax valuation" in 48 U.S.C. 1423a means "assessed valuation" even though Congress used "assessed valuation" in another statute)); *Deal v. United States*, 508 U.S. 129, 134 (1993) ("No one can disagree . . . that 'Congress sometimes uses slightly different language to convey the same message.'")). *See also Lawrence v. Florida*, ___ U.S. ___, 127 S. Ct. 1079, 1084 (2007) (holding that although 28 U.S.C. § 2263 and 28 U.S.C. § 2244 use different words, "it is clear that the language used in both sections provides that tolling hinges on the pendency of state review").

Similarly, that Congress amended Section 924(c) to make this relationship explicit, but has not similarly altered Section 844(h)(2), reflects only that there is little to be learned from Congressional inaction. *See, e.g., Bob Jones Univ. v. United States*, 461 U.S. 574, 600 (1983) (noting that "non-action by Congress is not often a useful guide").

That amendments made to Section 924(c) but not to Section 844(h)(2) provide little guidance on how to interpret Section 844(h)(2) is supported by the government's position that Section 844(h)(2) applies only to the defendant who both carries the explosive and commits the predicate felony. Govt. Br. 16. When first enacted in 1968, Section 924(c) stated: "Whoever . . . carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States. . . ." Resp. App. 9a. In 1971, Section 924(c) was amended to read: "Whoever . . . carries a firearm unlawfully during the commission of any felony *for which he* may be prosecuted in a court of the United States." *See* Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, Tit. II, § 13, 84 Stat. 1889-1890 (emphasis added). No such amendment has been made to Section 844(h), yet the government does not suggest that this inaction – this failure to make explicit that which was implicit – is of any significance.

IV. The Rule of Lenity Should Apply to Resolve Any Ambiguity in the Scope of Section 844(h)(2).

1. Contrary to the government's assertion that the rule of lenity does not apply in this case, Govt. Br. 33, "where text, structure, and history fail to establish that the Government's position is *unambiguously correct*, [this Court] appl[ies] the rule of lenity and resolve[s] the ambiguity in [the defendant's] favor." *United States v. Granderson*, 511 U.S. 39, 54 (1994) (emphasis added). As consulting those sources here shows, Congress has not "spoken in language that is clear and definite" enough to justify choosing the harsher alternative as to "what conduct Congress has made a crime" under Section 844(h)(2). *Cleveland v. United States*, 531 U.S. 12, 25 (2000) (internal quotation marks omitted); *United States v. Bass*, 404 U.S. 336, 347 (1971).[6] Consequently, doubt regarding the scope of the statute should be resolved in favor of lenity and thereby in favor of Respondent. *See Bass*, 404 U.S. at 347-48.

The "fundamental principles of due process," *Dunn v. United States*, 442 U.S. 100, 112 (1979), in which this "venerable rule," *United States v. R.L.C.*, 503 U.S. 291, 305 (1992), is rooted weigh in favor of

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[6] *See also Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997) ("The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole.").

applying it here.[7] This Court has "traditionally exercised restraint in assessing the reach of a federal criminal statute, both out of deference to the prerogatives of Congress, and out of concern that a fair warning should be given to the world in language that the common world will understand, of what the law intends to do if a certain line is passed." *See Arthur Andersen*, 544 U.S. at 703 (quoting *United States v. Aguilar*, 515 U.S. 593, 600 (1995)) (internal citations and quotation marks omitted).[8]

Such restraint is particularly appropriate here, where the exceptionally broad statutory definition of "explosive" for purposes of Section 844(h)(2) embraces many commonplace items and the lack of requirement that such items be carried "unlawfully" results in the statute clearly implicating conduct that may "by itself [be] innocuous." *Arthur Andersen*, 544 U.S. at 703. As a result, construing the ambiguity here to

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[7] The origins of the rule of lenity have been fully explored in Petitioner's Brief in *Burgess v. United States*, No. 06-11429, pp. 27-30, currently pending before the Court.

[8] For example, this Court has narrowly construed statutes where defendant's conduct fell within the broader possible interpretation. *See, e.g., Aguilar*, 515 U.S. at 599-600 (reading statute narrowly to require a nexus between defendant's obstructing or impeding "the due administration of justice" and a judicial proceeding, even though evidence established that defendant had uttered false statements to an investigating agent); *McBoyle v. United States*, 283 U.S. 25, 26-27 (1931) (applying rule of lenity even though the petitioner's conduct of transporting an airplane he knew to be stolen fell within the literal letter of the statute at issue).

extend the statute's reach to purely incidental carrying creates an intolerable risk that a defendant will "languish[ ] in prison" for ten years longer than Congress "has clearly said" he or she should. *Bass*, 404 U.S. at 348. *See also Castillo v. United States*, 530 U.S. 120, 131 (2000) (taking account of "the length and severity of an added mandatory sentence" as weighing in favor of rule of lenity). In contrast, a narrow construction "assur[es] that the society, through its representatives, has genuinely called for the punishment to be meted out." *R.L.C.*, 503 U.S. at 309 (Scalia, J., concurring).

2. Applying the rule of lenity also enables the Court to sidestep the "grave doubts" about the statute's constitutionality that would otherwise arise under the government's interpretation. *See Almendarez-Torres v. United States*, 523 U.S. 224, 237 (1998). As this Court has often instructed, in deciding which statutory interpretation to adopt, "a court must consider the necessary consequences of its choice." *Clark v. Martinez*, 543 U.S. 371, 380 (2005). "If one of them would raise a multitude of constitutional problems, the other should prevail – whether or not those constitutional problems pertain to the particular litigant before the Court." *Id.* at 380-81.

For example, under the government's interpretation of the statute, a defendant who happened to be lawfully carrying a can of gasoline or ammonium nitrate fertilizer when she knowingly used $150 worth of unauthorized food stamps would be subject to a mandatory ten-year sentence, whereas her

neighbor, who committed the same felony without the unrelated and legal item, could receive no more than a five-year sentence for the same underlying unlawful conduct. *See* 7 U.S.C. § 2024(b)(1). Such a prospect would offend equal protection principles. *See, e.g., Eisenstadt v. Baird*, 405 U.S. 438, 447 (1972) ("The Equal Protection Clause . . . den[ies] to State the power to legislate that different treatment be accorded to persons placed by a statute into different classes on the basis of criteria wholly unrelated to the objective of that statute. A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike.'") (quoting *Royster Guano Co. v. Virginia*, 253 U.S. 412, 415 (1920)).

In addition, construing Section 844(h)(2) as not requiring proof that the explosives were carried both during *and* in relation to a federal felony would render the statute void for vagueness. Reasonable people are unlikely to understand that mere and lawful carrying of an item such as a can of gasoline or fertilizer at the same time they commit a wholly unrelated felony itself is a forbidden act that carries a ten-year mandatory minimum sentence. *See Kolender v. Lawson*, 461 U.S. 352, 357 (1983). And the need to rely upon prosecutorial discretion to rein in the scope of Section 844(h)(2), *see* Govt. Br. 31, makes clear that a broad construction of the statute poses an unacceptable risk of arbitrary or unlawful enforcement.

See Kolender, 461 U.S. at 357; *cf. Baggett*, 377 U.S. at 373-74 ("Well-intentioned prosecutors and judicial safeguards do not neutralize the vice of a vague law.").[9]

CONCLUSION

For the foregoing reasons, this Court should affirm the decision of the court of appeals.

Respectfully submitted,

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February 2008

[9] These constitutional concerns are especially acute here, because Section 844(h)(2) does not require any *mens rea* with regard to carrying the explosives, beyond simply having them. *See Colautti v. Franklin*, 439 U.S. 379, 395 (1979) ("This Court has long recognized that the constitutionality of a vague statutory standard is closely related to whether that standard incorporates a requirement of *mens rea*.").

APPENDIX A

18 U.S.C. § 844 (2000)

Penalties

(a) Any person who –

(1) violates any of subsections (a) through (i) or (l) through (o) of section 842 shall be fined under this title, imprisoned for not more than 10 years, or both; and

(2) violates subsection (p)(2) of section 842, shall be fined under this title, imprisoned not more than 20 years, or both.

(b) Any person who violates any other provision of section 842 of this chapter shall be fined under this title or imprisoned not more than one year, or both.

(c)(1) Any explosive materials involved or used or intended to be used in any violation of the provisions of this chapter or any other rule or regulation promulgated thereunder or any violation of any criminal law of the United States shall be subject to seizure and forfeiture, and all provisions of the Internal Revenue Code of 1986 relating to the seizure, forfeiture, and disposition of firearms, as defined in section 5845(a) of that Code, shall, so far as applicable, extend to seizures and forfeitures under the provisions of this chapter.

(2) Notwithstanding paragraph (1), in the case of the seizure of any explosive materials for any offense for which the materials would be subject to forfeiture

in which it would be impracticable or unsafe to remove the materials to a place of storage or would be unsafe to store them, the seizing officer may destroy the explosive materials forthwith. Any destruction under this paragraph shall be in the presence of at least 1 credible witness. The seizing officer shall make a report of the seizure and take samples as the Secretary may by regulation prescribe.

(3) Within 60 days after any destruction made pursuant to paragraph (2), the owner of (including any person having an interest in) the property so destroyed may make application to the Secretary for reimbursement of the value of the property. If the claimant establishes to the satisfaction of the Secretary that –

(A) the property has not been used or involved in a violation of law; or

(B) any unlawful involvement or use of the property was without the claimant's knowledge, consent, or willful blindness,

the Secretary shall make an allowance to the claimant not exceeding the value of the property destroyed.

(d) Whoever transports or receives, or attempts to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property, shall be imprisoned for not more than ten years, or

fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not more than twenty years or fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(e) Whoever, through the use of the mail, telephone, telegraph, or other instrument of interstate or foreign commerce, or in or affecting interstate or foreign commerce, willfully makes any threat, or maliciously conveys false information knowing the same to be false, concerning an attempt or alleged attempt being made, or to be made, to kill, injure, or intimidate any individual or unlawfully to damage or destroy any building, vehicle, or other real or personal property by means of fire or an explosive shall be imprisoned for not more than 10 years or fined under this title, or both.

(f)(1) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other personal or real property in whole or in part owned or possessed by, or leased to, the United States, or any department or agency thereof, shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both.

(2) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct, directly or proximately causes personal injury or creates a substantial risk of injury to any person, including any public safety officer performing duties, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both.

(3) Whoever engages in conduct prohibited by this subsection, and as a result of such conduct directly or proximately causes the death of any person, including any public safety officer performing duties, shall be subject to the death penalty, or imprisoned for not less than 20 years or for life, fined under this title, or both.

(g)(1) Except as provided in paragraph (2), whoever possesses an explosive in an airport that is subject to the regulatory authority of the Federal Aviation Administration, or in any building in whole or in part owned, possessed, or used by, or leased to, the United States or any department or agency thereof, except with the written consent of the agency, department, or other person responsible for the management of such building or airport, shall be imprisoned for not more than five years, or fined under this title, or both.

(2) The provisions of this subsection shall not be applicable to –

(A) the possession of ammunition (as that term is defined in regulations issued pursuant to this chapter) in an airport that is subject to the regulatory

authority of the Federal Aviation Administration if such ammunition is either in checked baggage or in a closed container; or

(B) the possession of an explosive in an airport if the packaging and transportation of such explosive is exempt from, or subject to and in accordance with, regulations of the Research and Special Projects Administration for the handling of hazardous materials pursuant to chapter 51 of title 49.

(h) Whoever –

(1) uses fire or an explosive to commit any felony which may be prosecuted in a court of the United States, or

(2) carries an explosive during the commission of any felony which may be prosecuted in a court of the United States,

including a felony which provides for an enhanced punishment if committed by the use of a deadly or dangerous weapon or device shall, in addition to the punishment provided for such felony, be sentenced to imprisonment for 10 years. In the case of a second or subsequent conviction under this subsection, such person shall be sentenced to imprisonment for 20 years. Notwithstanding any other provision of law, the court shall not place on probation or suspend the sentence of any person convicted of a violation of this subsection, nor shall the term of imprisonment imposed under this subsection run concurrently with any other term of imprisonment including that

imposed for the felony in which the explosive was used or carried.

(i) Whoever maliciously damages or destroys, or attempts to damage or destroy, by means of fire or an explosive, any building, vehicle, or other real or personal property used in interstate or foreign commerce or in any activity affecting interstate or foreign commerce shall be imprisoned for not less than 5 years and not more than 20 years, fined under this title, or both; and if personal injury results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall be imprisoned for not less than 7 years and not more than 40 years, fined under this title, or both; and if death results to any person, including any public safety officer performing duties as a direct or proximate result of conduct prohibited by this subsection, shall also be subject to imprisonment for any term of years, or to the death penalty or to life imprisonment.

(j) For the purposes of subsections (d), (e), (f), (g), (h), and (i) of this section and section 842(p), the term "explosive" means gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, smokeless powders, other explosive or incendiary devices within the meaning of paragraph (5) of section 232 of this title, and any chemical compounds, mechanical mixture, or device that contains any oxidizing and combustible units, or other ingredients, in such

proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

(k) A person who steals any explosives materials which are moving as, or are a part of, or which have moved in, interstate or foreign commerce shall be imprisoned for not more than 10 years, fined under this title, or both.

(l) A person who steals any explosive material from a licensed importer, licensed manufacturer, or licensed dealer, or from any permittee shall be fined under this title, imprisoned not more than 10 years, or both.

(m) A person who conspires to commit an offense under subsection (h) shall be imprisoned for any term of years not exceeding 20, fined under this title, or both.

(n) Except as otherwise provided in this section, a person who conspires to commit any offense defined in this chapter shall be subject to the same penalties (other than the penalty of death) as the penalties prescribed for the offense the commission of which was the object of the conspiracy.

(o) Whoever knowingly transfers any explosive materials, knowing or having reasonable cause to believe that such explosive materials will be used to commit a crime of violence (as defined in section 924(c)(3)) or drug trafficking crime (as defined in

section 924(c)(2)) shall be subject to the same penalties as may be imposed under subsection (h) for a first conviction for the use or carrying of an explosive material.

APPENDIX B

18 U.S.C. § 924(c) (eff. 1968)

Whoever –

> (1) uses a firearm to commit any felony which may be prosecuted in a court of the United States, or
>
> (2) carries a firearm unlawfully during the commission of any felony which may be prosecuted in a court of the United States,

shall be sentenced to a term of imprisonment for not less than one year nor more than 10 years. In the case of his second or subsequent conviction under this subsection, such person shall be sentenced to a term of imprisonment for not less than five years nor more than 25 years, and, notwithstanding any other provision of law, the court shall not suspend the sentence of such person or give him a probationary sentence.

AMICUS CURIAE BRIEF

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Supreme Court, U.S.
FILED
FEB 27 2008
OFFICE OF THE CLERK

No. 07-455

IN THE

Supreme Court of the United States

UNITED STATES OF AMERICA,

Petitioner,

vs.

AHMED RESSAM,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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BRIEF OF NATIONAL ASSOCIATION OF CRIMINAL DEFENSE LAWYERS AS *AMICUS CURIAE* IN SUPPORT OF RESPONDENT

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QUESTION PRESENTED

Whether 18 U.S.C. § 844(h)(2) Should Be Construed in a Way That Would Allow Its Mandatory Ten Year Sentence To Be Imposed on a Person Who Innocently "Carries" a Legal and Commonplace But Nonetheless "Explosive" Substance Like Gasoline, Cleaning Fluid or Fertilizer, While Committing an Entirely Unrelated Federal Felony, Such As Uttering a Treasury Check or Making a False Statement.

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INTEREST OF AMICUS CURIAE[1]

The National Association of Criminal Defense Lawyers ("NACDL") is a non-profit organization with direct national membership of over 11,500 attorneys, in addition to more than 28,000 affiliate members from all 50 states. Founded in 1958, NACDL is the only professional bar association that represents public defenders and private criminal defense lawyers at the national level. The American Bar Association recognizes NACDL as an affiliated organization with full representation in the ABA House of Delegates. NACDL's mission is to ensure justice and due process for the accused; to foster the integrity, independence, and expertise of the criminal defense profession; and to promote the proper and fair administration of criminal justice, including issues involving the Bill of Rights.

ARGUMENT

In construing a statute, we of course focus first on the language of the statute itself. *See, e.g., Barnhart v. Sigmon Coal Co.*, 534 U.S. 438, 450 (2002). This does not mean, however, that one determines a statute's meaning by "dissect[ing] the meaning of" a single word. *Leocal v. Ashcroft*, 543 U.S. 1, 9 (2004)(Government's "primary focus" on the word "use" in 18 U.S.C § 16 "is too narrow"). *See Gooding v. Wilson*, 405 U.S. 518, 529 (1972)(Burger, C.J.,

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[1] Pursuant to Supreme Court Rule 37.6, counsel for amicus states that no counsel for a party authored this brief in whole or in part, and that no person other than amicus, its members, or its counsel made a monetary contribution to the preparation or submission of this brief. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

dissenting)(rejecting proposition that individual words should be "dissected with surgical precision using a semantic scalpel"); *Bailey v. United States*, 516 U.S. 137, 145 (1995). Rather, the meaning of a particular word "cannot be determined in isolation, but must be drawn from the context in which it is used." *Textron Lycoming Reciprocating Engine Div., v. United Auto., Aerospace, Agric. Implement Workers of Am., Int'l Union*, 523 U.S. 653, 657 (1998) (internal quotation marks omitted). This "cardinal rule" of statutory construction recognizes that a particular word "gathers meaning from the words around it," *Hibbs v. Winn*, 542 U.S. 88, 101 (2004) (internal quotation marks omitted); *Leocal*, 543 U.S. at 9. And wherever possible, effect should be given "to every word Congress used." *Reiter v. Sonotone Corp.*, 442 U.S. 330, 339 (1979). There is thus nothing remarkable about the proposition that, in context, a given word "may not extend to the outer limits of its definitional possibilities." *Dolan v. United States Postal Serv.*, 546 U.S. 481, 486 (2006).

"Just as a single word cannot be read in isolation, nor can a single provision of a statute." *Smith v. United States*, 508 U.S. 223, 233 (1993). Rather, the analysis should also be informed by neighboring provisions and the "broader context of the statute as a whole." *Robinson v. Shell Oil Co.*, 519 U.S. 337, 341 (1997). This includes giving a consistent construction to words as they are used throughout a particular enactment, and recognizing that an appropriate construction is one that comports with the objectives that are known to have driven the adoption of the legislation.

For that reason, individual words must be read not only in light of surrounding words and provisions, but also of the congressional purpose underlying the statute. *See, e.g., John Hancock Mut. Life Ins. Co. v. Harris Trust & Sav. Bank,* 510 U.S. 86, 94-95 (1993) (noting that Court interprets statutes "guided not by 'a single sentence or member of a sentence, but looking to the provisions of the whole law, and to its object and policy'") ; *Dolan,* 546 U.S. at 486; *Holloway v. United States,* 526 U.S. 1, 9 (1999). Reading the statute as whole, the overall purpose generally becomes apparent. Legislative history is useful to the extent it "reinforces this understanding of the statutory language." *Bowen v. Yuckert,* 482 U.S. 137, 148 (1987).

I. SECTION 844(h)(2)'S IMPOSITION OF A SEVERE, MANDATORY PENALTY ON ANYONE WHO "CARRIES AN EXPLOSIVE DURING THE COMMISSION OF ANY FELONY" MUST BE CONSTRUED IN LIGHT OF THE WORDS USED, THE SURROUNDING PROVISIONS, AND THE STATUTE'S OBJECTIVES

The notion that "[s]tatutory language has meaning only in context," *Graham County Soil & Water Conservation Dist. v. United States ex rel. Wilson,* 545 U.S. 409, 415 (2005), is nowhere more true than in determining the meaning of "carries an explosive during the commission of any felony" that can be prosecuted in the federal courts, as those words are used in Section 844(h)(2). As Justice Ginsburg has noted, "'carries' is a word of many meanings." *Muscarello v. United States,* 524 U.S. 125, 140 (1998) (Ginsburg, J., dissenting). Standing alone, the word

"carry" could mean, *inter alia*, "transport, possess, have in stock, prolong (carry over), be infectious, or wear or bear on one's person." *Id.* at 143.[2]

In the context of Section 844(h)(2), the nature of the "carrying" that is subjected to a severe mandatory penalty is defined in the first instance by the fact that it must involve "carr[ying] an explosive during the commission of any felony." Thus, the limits of the "carrying" that is prohibited depend on the substances that are encompassed within "explosive," and what it means to do the act "during the

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[2] Similarly, in the context of the phrases "carries an explosive" or "carries a firearm," it is far from obvious what degree of proximity to the "carrier" is required in order to come within the statute. The Fifth Circuit has held, under Section 844(h)(2), that the phrase applies if an explosive is "available to facilitate the crime or if it emboldened a defendant in his offense[.]" *United States v. Ivy*, 929 F.2d 147, 151 (5th Cir. 1991) (internal quotation marks omitted). Prior to this Court's decision in *Muscarello*, several courts of appeals interpreted the similar phrase "carries a firearm" in 18 U.S.C. § 924(c) to apply to guns that are "immediately available." *See United States v. Foster*, 133 F.3d 704, 705-08 (9th Cir. 1998), *overruled by Muscarello*, 524 U.S. at 125; *United States v. Giraldo*, 80 F.3d 667, 676 (2d Cir. 1996), *overruled by Muscarello*, 524 U.S. at 125. Under the reasoning of those cases and the four dissenters in *Muscarello*, whether or not a person "carries" a gun that is located in the glove compartment of his car would turn on whether or not the glove compartment is locked. Although this definition of "carries a firearm" was rejected by the majority in *Muscarello*, the relevant point is that the problem of the locked glove compartment, which sharply divided the *Muscarello* Court, cannot be solved or even anticipated by reference to the word "carries" alone. Such subtleties and nuances in a law's application can only be discerned by considering the surrounding provisions and the statute's purpose.

commission of any felony." At the same time, though, those limitations on the statute's prohibition also draw meaning from their neighboring terms, and from the statute's surrounding provisions and context.

The critical issue in this case is whether "carr[ying] an explosive during the commission of any felony" extends only to carrying that is related to the felony in some way, even though the words "in relation to" do not appear in the statute. In one respect, there can be no dispute that this is true. For even the Government agrees that "it is the defendant—rather than some other individual—who must commit the underlying felony 'during' which the explosive is carried[.]" Gov. Br. at 16. If the statute were read otherwise—if it were read in accordance with the bare meaning of the individual words (among which the word "any" arguably suggests the absence of such a limitation), to extend to carrying explosives during the commission of a felony by anyone at all—it would be satisfied by a simultaneous felony committed by someone else, in which the carrier had no role or knowledge. But reading the statute in that way would be arbitrary and verge on the nonsensical. It would penalize the carrier based on an eventuality wholly beyond his knowledge or control—the fact that a completely unrelated person happens to be committing a federal felony at the same time. This conclusion follows not because of any express statutory language, but because the alternative reading would make the statute a farce.

A. Section 844(h)(2)'s Prohibition on "Carr[ying] An Explosive During the Commission of a Felony" Must Be Understood in Light of the Definition of "Explosive" Set Forth in Section 844(j)

The obvious place to begin in construing the statute's application to "carr[ying] an explosive during the commission of any felony" is with any defined meanings of the terms used. And the word, "explosive," is defined with great clarity—and extraordinary breadth—just two provisions away in the same statute, in Section 844(j). There, following an extensive list of conventionally recognizable explosives—such things as "gunpowders, powders used for blasting, all forms of high explosives, and blasting materials," the statute concludes with a sweeping catch-all provision that encompasses any "other ingredients . . . such . . .that ignition . . .*may* cause an explosion." (Emphasis added.) Clearly the statute's definition was intended to cover "numerous possible explosives not specifically listed." *United States v. Poulos*, 667 F.2d 939, 942 (10th Cir. 1982).

It is thus entirely clear that the substances whose carrying will be penalized under the statute are not confined to articles that anyone could reasonably discern as an "explosive device," or a substance like dynamite or C4 explosive that is conventionally recognized as such. They encompass virtually anything at all that has the capacity to cause an explosion of some sort under some set of circumstances. It is also noteworthy that the statute's breadth is not confined by any limitation as to the quantity of the substance or the size of the explosion that it could possibly produce. Thus, even a

single firecracker will suffice to meet the statute's definition. And certainly, the definition's reach is not confined by any requirement that the act of possessing the item or substance be, apart from its role in an offense defined by Section 844, an illegal act.

The extraordinary breadth of the substances encompassed within the "explosive[s]" whose possession will trigger the application of Section 844(h)(2) is clear not only from the plain words of Section 844(j), but also from the legislative history of that provision. In enacting the Explosives Control Act, of which Section 844(j) is a part,[3] Congress considered two versions of the section that would become Section 844(j), and ultimately, after much discussion and debate, adopted the broader one. As the Seventh Circuit explained in *United States v. Agrillo-Ladlad*, 675 F.2d 905, 905-909 (7th Cir. 1982), during the hearings it was plainly recognized that the broader provision (as adopted) would extend to such "common materials such as gasoline, other flammable liquids, and ammonium nitrate," and that such a definition could adversely impact upon "sportsmen, farmers, and people engaged in legitimate manufacture, transportation, distribution and use of such materials." Hearings on H.R. 17154, H.R. 16699, H.R. 18573 Before Subcomm. No. 5 of the Comm. on the Judiciary, House of Rep., 91st Cong., 2d Sess., at 64, 106 (1970) ("Hearings"). Congress adopted the broader of the two definitions despite these concerns, and despite the Secretary of Interior's

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[3] Title XI of the Organized Crime Control Act of 1970, Pub. L. 91-452, Title XI, § 1102, 84 Stat. 952 (1970).

warning that the broader proposal would define as an explosive any highly flammable substance such as gasoline, cleaning fluids and commercial solvents, and ammonium nitrate, which is a widely-used commercial fertilizer. *See Agrillo-Ladlad*, 675 F.2d at 909 n.5; Hearings at 157. Thus, Congress, in enacting Section 844(j), intended to sweep broadly and encompass in the definition of "explosive" for purposes of the criminal provisions of the Explosives Control Act[4] any substance with the capacity to explode under some circumstances, whether its possession was otherwise legal or not.[5]

Reflecting the plain language and this legislative history, the cases applying the definition of explosives have recognized that Section 844(j) "cast its definitional net quite widely." *United States v. Mena*, 933 F.2d 19, 26-27 (1st Cir. 1991). In order to fall under the Section 844(j) definition of explosive, a substance need only pose "*some possibility* of explosion." *United States v. Colón Osorio*, 360 F.3d 48, 51 (1st Cir. 2004) (emphasis added). The courts of appeals have held that Section 844(j)'s definition of

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[4] Specifically, 18 U.S.C. §§ 844(d)-(i) and 842(p).

[5] As originally enacted in 1970, the provision at issue contained a requirement that the particular act of "carr[ying] an explosive" be done "unlawfully." That requirement was in some tension with the broad definition of "explosives," which plainly extends to many commonplace substances that are legally possessed by numerous people. In 1988, at the same time that Congress inserted language to strengthen the statute's penalties, it eliminated the requirement that the carrying of the explosive be done "unlawfully," and thus clarified that the statute could apply to the otherwise wholly lawful carrying of lawful substances. Anti-Drug Abuse Act of 1988, Pub. L. 100-690, § 6474(b), 102 Stat. 4181, 4380 (1988). *See infra*, at 15.

explosive includes gunpowder contained in a small legal firecracker or a single bullet. *United States v. Davis*, 202 F.3d 212, 219 (4th Cir. 2000). Similarly, Fourth of July display fireworks are explosives within the Section 844(j) definition. *United States v. Shearer*, 479 F.3d 478, 482 (7th Cir. 2007). Also included in Section 844(j)'s sweep are everyday substances like gasoline. *See, e.g., United States v. Anderson*, 782 F.2d 908, 912 (11th Cir. 1986); *United States v. Lee*, 726 F.2d 128, 131 (4th Cir. 1984); *United States v. Beldin*, 737 F.2d 450, 455 (5th Cir. 1984); *United States v. Lorence*, 706 F.2d 512, 516-17 (5th Cir. 1983); *United States v. Bunney*, 705 F.2d 378, 380-81 (10th Cir. 1983). *But see United States v. Gelb*, 700 F.2d 875, 878-79 (2d Cir. 1983) (rejecting application of §§ 844(h) and (i) to defendant's use of gasoline to set fire to a commercial building he owned). Even naturally occurring substances fall within the definition of explosives for purposes of these criminal statutes, provided that they meet the requirement of a capacity possibly to explode. *See United States v. Hepp*, 656 F.2d 350, 352 (8th Cir. 1981) (holding that a "mixture of methane and air" is sufficient to satisfy § 844(j)'s definition of "explosive").

It is ironic that, while Congress adopted the broader of the two considered definitions of "explosive" for use in the criminal provisions of Section 844 and in Section 842(p), it enacted the narrower definition to govern the scope of substances subject to federal regulation. *See* H.R. 18573 (narrow definition of explosive as contained in proposed legislation); 18 U.S.C. § 841(d) (definition of explosive for the purpose of federal regulation). As a result, "explosive" is defined more narrowly in the context of licensing and other regulatory activities than it is for

the purposes of criminal law. *Compare* 18 U.S.C. §§ 841(d) and 844(j). Thus, substances that are not only legal, but that may be acquired and possessed without a federal permit, can nonetheless become the predicate for a severe mandatory criminal penalty if that possession occurs "during the commission of any [federal] felony," whatever exactly those words mean as used in Section 844(h)(2).

B. Because "Explosive[s]" Are Expressly Defined in the Statute to Include Many Legal and Common Substances, Section 844(h)(2) Imposes Heavy Mandatory Criminal Penalties on the Basis of Conduct that May Be Wholly Innocent Standing Alone, and Objectionable Only Because of Any Relationship It Bears to the Predicate Felony

It follows unmistakably from the sweeping definition of "explosives" set forth in Section 844(j) that a hypothetical statute that criminalized merely "carr[ying] an explosive" would penalize a range of entirely common activities. A hunter who possesses gunpowder and loads his own shotgun shells—or even just possesses bullets manufactured by someone else; a vendor—or even a user—of Fourth of July fireworks; a farmer using explosive fertilizer for his crops—or a homeowner using it for his yard; or anyone pouring gasoline into a lawnmower—or even putting it into his car—is involved in the act of "carr[ying] an explosive" within the broad definition provided in Section 844(j).

The prohibition of Section 844(h)(2), with its severe mandatory sentence, is precisely this hypothetical statute, with the added requirement that the act of "carr[ying] an explosive" must occur

"during the commission of any felony." Thus, if Section 844(h)(2) is to avoid a meaning nearly as absurd as the hypothetical statute outlined above, it can only be because of the meaning ascribed to "during the commission of any felony," and its relation to the act of "carr[ying] an explosive."

Thus, the Government's position that no relationship at all need exist between the carrying of explosives and the predicate federal felony under Section 844(h)(2), leads inherently to a highly unreasonable construction of the statute. With felonies defined in federal law as crimes not otherwise classified for which the "maximum term of imprisonment authorized is . . . more than one year," 18 U.S.C. § 3559(a), the mandatory ten or twenty year sentence enhancement based on the unrelated, lawful, and entirely normal carrying of everyday substances which happen to qualify as "explosive[s]," will frequently dwarf the sentence for the defendant's predicate felony. And, ironically, that predicate felony may well be a defendant's only illegal conduct. A sentence enhancement based on the lawful possession of a legal explosive substance during the commission of a felony only makes sense if such otherwise lawful conduct bears a relationship to the commission of the felony.

Consider the consequences if "carrying . . . during" imparts no requirement of a relationship between the "carrying" and the underlying felony. Take for example the felony charge of making a false statement to a United States custom official. 18 U.S.C. § 1001. Since the definition of "explosive" encompasses some cleaning fluids and commercial solvents, Section 844(h)(2)'s ten year penalty would

attach to a domestic worker who crosses over the border from Mexico to California in order to do domestic work while carrying such work supplies, and falsely states to the customs official that she is crossing the border for a short vacation. *See Agrillo-Ladlad*, 675 F.2d at 909 n.5 (noting that "cleaning fluids and many other commercial solvents" fall within the definition of "explosive"). In the absence of any required relation between the predicate felony and the carrying of explosives, Section 844(h)(2) could be invoked to drastically increase the sentence she faces. If, on the other hand, Section 844(h)(2) is properly read to include a relational requirement between the felony and the explosive, the maid would face a far less severe penalty—a fine or imprisonment of not more than 5 years, as prescribed by 18 U.S.C. § 1001(a).

Under the Government's construction, requiring no relationship between the predicate felony and "carr[ying] an explosive," innumerable instances arise where the heavy ten or twenty year penalty proscribed by Section 844(h)(2) would attach based on legal, innocent and utterly routine conduct. If a farmer charged with making false statements to influence the Federal Crop Insurance Corporation (in violation of 18 U.S.C. § 1014) were carrying commercial fertilizer (with the capacity to explode) when the loss adjustor stopped by to talk with him, the Government's construction of the statute would expose him to an additional ten years in prison despite the fact that the ammonium nitrate was perfectly legal for him to possess and in no way related to the underlying felony. *See Agrillo-Ladlad*, 675 F.2d at 909 n.5 (noting that the definition of "explosive" "includes ammonium nitrate which is a

videly-used commercial fertilizer"). A similar result would obtain for a person attempting to cash a counterfeit check, *see* 18 U.S.C. § 513(a), while carrying a firecracker in his pocket. Or a hunter falsely claiming to a Forest Service Ranger that he possesses a hunting license while carrying ammunition for his hunt.

Such sentences are completely arbitrary, precisely because they attach extremely severe consequences to behavior—here the innocent possession of common substances which is entirely legal apart from whatever consequences flow from the provisions of Section 844(h)(2)—which its perpetrator could reasonably have believed to be entirely proper. As this Court said in *Arthur Andersen LLP v. United States,* 544 U.S. 696, 703 (2005), the Court's "traditionally exercised restraint in assessing the reach of a federal criminal statute . . . is particularly appropriate . . . where the action underlying the conviction . . . is by itself innocuous." (Internal quotation marks omitted.)

In this case, such restraint requires nothing more than simply reading the statute's prohibition in context, attentive to all of its words and with the consequences of alternative reasonable constructions in mind. When "carries an explosive during the commission of any felony" means carrying it in a manner bearing some relation to that felony—and only then—the carrying of an explosive aggravates the character of the underlying felony and justifies a sentence enhancement. The fact that the dangerous instrumentality of an explosive substance has been brought to bear in connection with the commission of a felony renders the underlying crime more serious.

And this may be a reasonable conclusion even if the mere act of possessing the substance is entirely legal.

Thus, while it makes no sense that a farmer innocently carrying commercial fertilizer while making an unrelated false statement to a government official should be sentenced under Section 844(h)(2), it makes perfect sense for a person whose carrying of the same substance has some role to play in the commission of a different crime. This is true even where the possession of the substance, standing alone, may otherwise be entirely unobjectionable.[6]

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[6] Indeed, if the statute is not read as requiring some relation between the carrying of the explosive and the underlying felony, there may even be constitutional questions regarding the statute's validity as a matter of equal protection and/or substantive due process analysis. It is entirely irrational and arbitrary to heavily punish the completely commonplace and legal carrying of items like gasoline, fertilizer, or cleaning fluid, simply because the carrying occurs at the same time as a completely unrelated felony. *See Matthews v. de Castro*, 429 U.S. 181, 185 (1976) (a law will not be upheld under the rational basis test if it is "clearly wrong, a display of arbitrary power, not an exercise of judgment") (internal quotation marks omitted). Under the Government's reading of § 844(h)(2), two individuals who committed identical felonies would face very disparate penalties, simply because one of them happened to be carrying one of these legal and common, but nonetheless "explosive" substances, even though it does not relate to the underlying felony. Imposing such differing punishments on two people with indistinguishable culpable conduct bears no rational relationship to any discernible purpose that Congress may have had in enacting the statute. *See United States R.R. Ret. Bd. v. Fritz*, 449 U.S. 166, 184 (1980) ("A classification 'must be reasonable, not arbitrary, and must rest upon some ground of difference having a fair and substantial relation to the object of the legislation, so that all persons similarly circumstanced shall

C. The Historical Evolution of the Statute's Provisions and Its Overall Purpose Confirm that an "Explosive" Must Be "Carrie[d]" in Relation to the Predicate Felony

The unreasonableness of the Government's assertion that Section 844(h)(2) applies even absent any relationship between the carrying of explosives and the commission of the required felony is apparent for several further reasons.

First, in addition to defining "explosive" in the original 1970 statute in a manner that clearly encompassed legal and ordinary substances, Congress in 1988 clarified beyond doubt that the statute may be triggered by the carrying of explosives that, standing alone, is entirely legal and proper. In that year, at the same time that Congress inserted language to increase the statute's penalties, it eliminated the pre-existing requirement that the carrying of the explosive be "unlawful." Anti-Drug Abuse Act of 1988, H.R. 5210, 100th Cong., § 6474(b) (1988).[7] Having originally adopted a very broad

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(continued...)

be treated alike.'") (quoting *Johnson v. Robison*, 415 U.S. 361, 374-75 (1974)).

[7] The 1988 amendment also inserted language increasing the mandatory minimum penalty for violating 18 U.S.C. § 844(h) from one year to ten years. *See* Anti-Drug Abuse Act § 6474(b)(2). A bill analysis in the Congressional Record simply notes that "Section 6474(b) would strengthen the offense in 18 U.S.C. 844(h) of using or carrying an explosive during the commission of a federal felony, so as to bring it in line with similar amendments adopted in the Comprehensive Crime Control Act of 1984 and the Firearms Owners' Protection Act of 1986 with respect to the parallel offense of using or carrying a

definition of explosives in Section 844(j), Congress now made explicit that the carrying of those explosives need not be illegal for the statute's heavy penalties to apply—it need only be "during the commission of a federal felony." Had Congress supposed that the "during the commission" limitation had the meaning that the Government now ascribes to it—and that minor federal felons could trigger the statute's ten year minimum sentence through innocent and legal conduct unrelated to the predicate felony—one might have expected someone to at least raise the issue. But the legislative history does not indicate that the thought ever occurred to anyone. In the absence of any comment raising the possibility of such a remarkable consequence, it is not reasonable to find it within the contemplated meaning of the statute. Congress's silence under these circumstances "can be likened to the dog that did not bark." *Chisom v. Roemer*, 501 U.S. 380, 396 n.23 (1991). The absence of legislative comment should lead to the "common sense" conclusion that Congress did not intend such an extreme and implausible meaning. *See, e.g., Koons Buick Pontiac GMC, Inc. v. Nigh*, 543 U.S. 50, 63 (2004); *City of Rancho Palos Verdes v. Abrams*, 544 U.S. 113, 131 (2005) (Stevens,

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firearm during the commission of federal offenses. Presently, as a result of the above-referenced amendments to 18 U.S.C. 924(c), a person who uses a firearm to commit a bank robbery would be subject to harsher penalties than a person who committed the same offense using an explosive. There is no justification for this disparity." 134 Cong. Rec. S17360-02 (1988). Of course, under § 924(c), the statute states that the carrying must be "in relation to" the underlying crime.

J., concurring); *Harrison v. PPG Indus.*, 446 U.S. 578, 602 (1980) (Rehnquist, J., dissenting).

Second, the bizarre results that flow from the Government's construction are not supported by the legislative history of Section 844(h), which indicates a general intent to create enhanced penalties for introducing the often-dangerous instrumentality of explosives into the commission of federal crimes. That history indicates a purpose to "protect interstate and foreign commerce by reducing the hazards to persons and property associated with the misuse of explosives." H.R. Rep. No. 91-1549, at 64 (1970). In fact, Congress passed Section 844 specifically to confront the "threat of bombings [that] ha[d] become an ugly and recurrent incident of life" in American cities as signs of protest against the Vietnam War in the late 1960s and 1970. Hearings at 1. These events that led Congress to act occurred when a person used or carried explosives in relation to misconduct, such as the commission of another crime. It is this behavior that Congress aimed to combat. These hazards do not occur when one properly possesses and uses legal substances and also happens to commit a crime to which the substances have no connection of any sort, and Congress did not intend to curtail such legal conduct.

Finally, it is instructive that the appropriate reading of the words "carries explosives during the commission of a federal felony," follows a repeated and understandable pattern of other federal criminal provisions, which impose one penalty for a base offense, and a separate offense based on the use or presence of a specified dangerous instrumentality in connection with the commission of the crime. The

federal firearm statute, for example, provides for a mandatory minimum sentence of five years when a person carries or uses a firearm "during and in relation to any crime of violence or drug trafficking crime." 18 U.S.C. § 924(c). Similarly, under the federal bank robbery statute, the maximum penalty in the absence of a "dangerous weapon or other device" is twenty years, 18 U.S.C. § 2113(a), whereas, with the use of such an instrumentality, it is twenty-five years, 18 U.S.C. § 2113(d).

In enacting Section 844(h), Congress made clear that the new explosives statute was patterned on the existing gun control statute. *See* H.R. Rep. No. 91-1459, at 69 ("[§ 844(h)] carries over to the explosives area the stringent provisions of the Gun Control Act of 1968 relating to the use of firearms and the unlawful carrying of firearms to commit, or during the commission of a federal felony"). Certainly there is no reason to shy away from the sensible conclusion—that otherwise follows from the statute's words in context—that the statute imposes a quite severe sentence enhancement on the basis of what may otherwise be perfectly lawful conduct, when and *because* a dangerous instrumentality was used or possessed in relation to the underlying crime.

II. THIS CASE PROVIDES A POOR VEHICLE TO RESOLVE THE QUESTION PRESENTED, BECAUSE RESPONDENT WAS CONVICTED OF SEVERAL SERIOUS OFFENSES IN WHICH THE CARRYING OF EXPLOSIVES PLAYED AN INTEGRAL PART

The statutory construction question presented in this case is whether Section 844(h)(2)'s severe sentence enhancement "requires that the explosives

be carried 'in relation to' the underlying felon." Gov. Br. at i. As discussed above, the proposition maintained by the Government, that no relationship of any kind is required, faces tough sledding when the facts of the case actually mirror that premise. Minor felons who forge checks or misstate any fact to a federal official run the risk—and thus may have to plea bargain against the threat—of possible mandatory sentences of ten or twenty years, because they are unlucky enough to have gasoline in their car's tank or cleaning solvents in their trunk.

The facts of this case present none of these difficulties. Here, respondent's carrying of explosives was instrumental to his criminal conduct. Respondent was charged with nine counts, five of which appear to relate to his carrying of explosives. He was charged—and convicted after trial—of an act of terrorism transcending a national boundary in violation of 18 U.S.C. § 2332b(a)(1)(B) (Count 1), and respondent carried the explosives in order to further his felony act of terrorism. Respondent was also charged and convicted of placing an explosive in proximity to a terminal in violation of 18 U.S.C. § 33 (Count 2), smuggling explosives into the United States in violation of 18 U.S.C. § 545 (Count 6), transportation of explosives without a permit in violation of 18 U.S.C. § 842(a)(3)(A) (Count 7), and the unregistered possession of a destructive device in violation of 26 U.S.C. § 5861(d) (Count 8). Presumably, any of these counts would have amply supported the charge under Section 844(h)(2), had the government simply bothered to charge the case in that way.

Instead, although respondent was charged with multiple counts that were closely related to his carrying of an explosive, the Government chose not to charge Section 844(h)(2) in connection with any of these counts. For reasons known only to the Government, [8] the indictment appended Section 844(h)(2)'s enhancement to a charge of making a false statement to a customs official, an offense completely unrelated to the carrying of an explosive. As a result, the Government has presented a legal issue that only exists in this case because of the Government's peculiar charging decisions, and not because the respondent's felonious conduct lacked a relationship to his carrying of an explosive.

It is impossible to reflect on this case without focusing on the fact that it involved a carefully-conceived terrorist plot to blow up Los Angeles International Airport. Given the gravity of these facts, this case appears deceptively easy. A person who carries explosives to further a crime of terrorism deserves grave penalties. But a check forger with a legal firecracker in his pocket and a housekeeper who

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[8] One plausible speculation as to the reason for this decision was that the Government was unsure of its ability to prove the intent required by the full-blown terrorist-related course of conduct put in issue by the charge in the first count. Perhaps it thought that the jury might decline to find proof beyond a reasonable doubt of the underlying terrorist plot, and thus sought to secure a substantial mandatory of sentence of no less than ten years, even if that came to pass. The question whether § 844(h)(2) should apply to a defendant convicted only of making a false statement, by a jury that rejects a series of other allegations in which carried explosives actually played an important role, is the real question presented to the Court. On the present facts, it is entirely hypothetical.

lies at the border while carrying cleaning supplies do not. The Question Presented actually determines the outcome in the latter cases—but not in cases with facts like those now before the Court. Thus, the Court may wish to consider awaiting a case that more clearly frames the breadth and consequences of the Government's proposed statutory construction before deciding this issue.

Respectfully submitted,

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February 27, 2008

REPLY BRIEF

No. 07-455

In the Supreme Court of the United States

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

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In the Supreme Court of the United States

No. 07-455

UNITED STATES OF AMERICA, PETITIONER

v.

AHMED RESSAM

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

In this case, the Ninth Circuit added to the offense of "carr[ying] an explosive during the commission of any [federal] felony," 18 U.S.C. 844(h)(2), a non-textual requirement that the government must establish that the explosive was carried "*in relation to*" the underlying felony. Pet. App. 2a. Respondent and his amicus fail to identify anything in the statutory text that even arguably supports a relational requirement. Instead, they would rewrite the statute to include that requirement on the theory that, given the breadth of various terms Congress *has* set forth in the statutory text, Section 844(h)(2) "must be read to require that the explosives carried bear a relationship to the underlying felony." Resp. Br. 3. But this Court has rejected "the broad proposition that criminal statutes do not have to be read as broadly as they are written," *Brogan* v. *United States*, 522 U.S. 398, 406 (1998), and no background interpretive

principle warrants an exception in this case to the general rule against "reading words or elements into a statute that do not appear on its face." *Bates* v. *United States*, 522 U.S. 23, 29 (1997). Section 844(h)(2) unambiguously reaches respondent's conduct, and the court of appeals erred in holding otherwise.

A. The Statutory Text Is Clear That The Explosive Need Only Be Carried "During The Commission Of" The Underlying Felony

1. "[C]ourts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Connecticut Nat'l Bank* v. *Germain*, 503 U.S. 249, 253-254 (1992). "When the words of a statute are unambiguous, then, this first canon is also the last: 'judicial inquiry is complete.' " *Id.* at 254 (quoting *Rubin* v. *United States*, 449 U.S. 424, 430 (1981)). That canon is sufficient here.

2. The statutory text clearly describes the required relationship between the explosive and the underlying felony: the explosive must have been "carrie[d] * * * during the commission of" that felony. 18 U.S.C. 844(h)(2). Neither respondent nor his amicus makes any attempt to refute the basic point that "[t]he plain everyday meaning of 'during' is 'at the same time' or 'at a point in the course of,'" not "'at the same time and in connection with.'" *United States* v. *Rosenberg*, 806 F.2d 1169, 1178-1179 (3d Cir. 1986) (citation omitted), cert. denied, 481 U.S. 1070 (1987); see U.S. Br. 13-14. To the contrary, respondent acknowledges (Resp. Br. 5) that he loses under "a literal reading of Section 844(h)(2)."[1]

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[1] Respondent's contention (Resp. Br. 11 n.3) that "the government's reading of Section 844 would compel the conclusion that 'carries' has a more narrow meaning in Section 844(h)(2) than it does in [18 U.S.C]

Respondent contends (Resp. Br. 24-25) that a straightforward reading of Section 844(h)(2) would make the words "the commission of" superfluous. But see U.S. Br. 15-16 (explaining why that assertion is incorrect, and would not warrant reading a relational element into Section 844(h)(2) even if it were correct). Respondent undermines his own position, however, by providing another explanation (Resp. Br. 24) for why Congress may have chosen the phrase "carries during the commission of" rather than "carries during"—that is, to parallel the verb structure of Section 844(h)(1), which applies when a defendant "uses fire or an explosive to commit" the underlying felony.

More fundamentally, respondent's assertion (Resp. Br. 7) that a relational element is "implicit" in Section 844(h)(2) would, if adopted, create a far more serious surplusage problem than any it would solve, because it would mean that the words "and in relation to" in 18 U.S.C. 924(c)(1) are entirely superfluous. Respondent attempts to avoid that difficulty by noting that "Congress sometimes uses different words in different statutes even though it intends those words to have the same meaning." Resp. Br. 25 (internal quotation marks

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924(c)(1)" is both incorrect and beside the point. The express relational element in Section 924(c)(1) was simply one factor that this Court cited in support of its construction of the term "carry" in *Muscarello* v. *United States*, 524 U.S. 125 (1998). The other interpretive factors dictate the conclusion that "carries" means the same thing in both statutes. Given the inherently dangerous and unpredictable nature of explosives, it is not difficult to see a sound reason for Congress's omission of a relational requirement from Section 844(h)(2). Pet. App. 28a n.1 (O'Scannlain, J., dissenting from denial of rehearing en banc). In any event, respondent conceded below that he was carrying the explosives found in the trunk of his car (*id.* at 12a), and he did not contest the issue in his brief in opposition.

and citation omitted). That is true enough. But, when Congress so intends, it "uses * * * different language *that means the same thing*." *Deal* v. *United States*, 508 U.S. 129, 134 (1993). Respondent does not assert that "during the commission of" means the same thing as "during and in relation to," and other statutes in which Congress has used the former phrase underscore that it does not. See 18 U.S.C. 231(a)(3) (making it unlawful to obstruct the lawful actions of "any fireman or law enforcement officer * * * incident to *and* during the commission of a civil disorder") (emphasis added); 21 U.S.C. 848(e)(1)(B) (authorizing the death penalty for any person who "during the commission of, in furtherance of, *or* while attempting to avoid apprehension * * * for" certain specified felonies "intentionally kills * * * or causes the intentional killing" of a law enforcement officer) (emphasis added).

Nor is respondent's position improved by the fact that Section 844(h)(2) does not in so many words state that the defendant must be liable for the underlying felony. Resp. Br. 24-25; Amicus NACDL Br. 5. The words "during the commission of any felony," when taken in isolation, may not conclusively resolve that question. But the first word of Section 844(h) is "[w]hoever," which makes clear that the defendant must be the perpetrator of at least some of the conduct identified in Section 844(h)(2), and subsequent portions of Subsection (h) clearly presuppose that the defendant must commit the underlying felony during which the explosive is carried. See 18 U.S.C. 844(h) (stating that the mandatory ten-year term of imprisonment shall be "in addition to the punishment provided for such felony"). In contrast, nothing in Section 844(h)'s text suggests that the defendant's carrying of explosives must have "aided the com-

mission of the underlying felony in some way." Pet. App. 13a. Indeed, the contrast between Subsections (h)(1) and (h)(2) demonstrates that Subsection (h)(2) requires no such showing. See U.S. Br. 14-15.

Respondent also relies on (Resp. Br. 13) Section 844(h)'s final clause, which provides that its mandatory ten-year term of imprisonment shall not "run concurrently with any other term of imprisonment including that imposed for the felony *in which* the explosive was used or carried." Because that clause, like those that immediately precede it, addresses the nature of the sentence to be imposed on defendants convicted under *both* Subsections (h)(1) and (2), it makes sense that those clauses refrain from using a term—*i.e.*, "during"—that appears only in Subsection (h)(2). Nor does respondent explain how the words "in which" can sensibly be viewed as embodying a requirement that the explosive be carried "in relation to" the underlying felony.

Respondent cites 18 U.S.C. 844(m)—which makes it unlawful to "conspire[] to commit an offense under subsection (h)"—and suggests that, because "it is not a criminal conspiracy to agree to do something that is lawful," Section 844(h)(2) must contain an implicit relational requirement. Resp. Br. 17. That argument, however, is premised on the view that it is generally lawful to carry an explosive while committing a federal felony, and thus assumes away the very question at issue in this case.

Finally, respondent references various other subsections of Section 844 that create criminal offenses, posits that "it is the *misuse* of explosives that is the common subject" of these provisions, and asserts that, as a result, "Section 844(h)(2) requires a relationship between the explosives carried and the underlying felony." Resp. Br. 15. That argument is flawed at every step. Respon-

dent's conjecture that Section 844(h)(2) is designed only to address situations where a defendant "intended to use explosives 'during the commission of a felony,' but w[as] interrupted or otherwise dissuaded" (Resp. Br. 14) has absolutely no support in the statutory text. In addition, the very provisions respondent cites show that Congress knew perfectly well how to create attempt or intent-based offenses involving explosives. See, *e.g.*, 18 U.S.C. 844(d) ("transport[ing] or receiv[ing], or attempt[ing] to transport or receive, in interstate or foreign commerce any explosive with the knowledge or intent that it will be used" to kill or injure a person or damage or destroy property); 18 U.S.C. 844(f)(1) ("attempt[ing] to damage or destroy" federally owned property); 18 U.S.C. 844(i) ("attempt[ing] to damage or destroy" real or personal property used in any activity "affecting interstate or foreign commerce"). Furthermore, two other criminal offenses set forth in Section 844 manifestly do not require the actual, attempted, or intended use of an explosive: Section 844(g)(1), which makes it generally unlawful to "possess[] an explosive" in an airport or any federal building, and Section 844(e), which prohibits use of any instrument of interstate commerce to make genuine *or false* bomb threats. And Congress could reasonably have determined that carrying an explosive while committing a federal felony *is*—without more—"misuse" of that explosive in much the same way that bringing an otherwise lawfully possessed explosive into an airport or federal facility constitutes "misuse."[2]

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[2] Although it is likely that respondent lied to the customs inspector at least in part "*because* he was smuggling explosives in the trunk of his car," Pet. App. 13a (emphasis added), this Court has held that the "in relation to" element contained in 18 U.S.C. 924(c)(1) requires proof that the firearm "facilitat[ed], or ha[d] the potential of facilitating" the un-

B. The Breadth Of The Other Terms In Section 844(h)(2) Cannot Support Reading In A Textually Unsupported Relational Element

Respondent and his amicus never attempt to explain how the words "during the commission of" can reasonably be understood to mean "during and in relation to." Instead, their principal submission is that because various other terms in the statute—including "explosive," "any [federal] felony," and "carries"—are "remarkably broad," Section 844(h)(2) "must be read to require that the explosives carried bear a relationship to the underlying felony." Resp. Br. 3-4; see Amicus NACDL Br. 6-14. That contention lacks merit.

Respondent cites various decisions where this Court has concluded that the meaning of an otherwise ambiguous term could be clarified by reference to: (i) other, more specific, words in a series of which the ambiguous

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derlying offense. *Smith* v. *United States*, 508 U.S. 223, 238 (1993) (quoting *United States* v. *Stewart*, 779 F.2d 538, 540 (9th Cir. 1985)). Nor is the suggestion (Resp. Br. 2, 23-24; Amicus NACDL Br. 19-20) that the government could have charged this case differently relevant to the statutory construction question in this case. Even if the government could have shown a relational element to other felonies in this case, "what charge[s] to file or bring before a grand jury are decisions that generally rest in the prosecutor's discretion." *United States* v. *Batchelder*, 442 U.S. 114, 124 (1979). And although it is cost-free for respondent to concede now that "the evidence was sufficient to prove a relationship between the carrying of explosives and the terrorism charge," Resp. Br. 23-24, it is quite another to require the government to establish such a relationship beyond a reasonable doubt at trial. More fundamentally, the possibility of proving a judicially imposed relational element in a particular case does not detract from the proposition that the government's burden should be limited to proving the elements specified by Congress.

general term was a part (the canon of *ejusdem generis*);[3] (ii) the broader context in which the ambiguous term was used;[4] or (iii) the manner or context in which the same term was used in other sections of the same statute.[5] But respondent fails to identify any language in Section 844(h)(2) that is even arguably ambiguous with respect to the question presented here. In addition, the statutory terms that respondent cites are neither part of a list nor share any common attribute, and nothing in the overall statutory context suggests that they serve to narrow the clear meaning of "during the commission of." See *Ali* v. *Federal Bureau of Prisons*, 128 S. Ct. 831, 839-840 (2008). This Court should reject respondent's "attempt to create ambiguity where the statute's text and structure suggest none." *Id.* at 840.

Although neither respondent nor his amicus invokes it by name, much of their argument sounds in the canon against absurdities. See, *e.g.*, Resp. Br. 12-13, 29-30 (suggesting, *inter alia*, that Section 844(h)(2) might apply to a person who delivers gasoline to a stranded friend while simultaneously possessing a counterfeit $20

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[3] See *United States* v. *Aguilar*, 515 U.S. 593, 598-599 (1995); *McBoyle* v. *United States*, 283 U.S. 25 (1931) (Holmes, J.).

[4] See *Dolan* v. *USPS*, 546 U.S. 481, 485 (2006) (applying the canon of *noscitur a sociis* in interpreting the third item in the phrase "loss, miscarriage, or negligent transmission of letters or postal matter"); *Leocal* v. *Ashcroft*, 543 U.S. 1, 9 (2004) (concluding that the full phrase "use of physical force against the person or property of another," 18 U.S.C. 16(a), "most naturally suggests a higher degree of intent than negligent or merely accidental conduct").

[5] See *Owasso Indep. Sch. Dist.* v. *Falvo*, 534 U.S. 426, 434-435 (2002) (examining various requirements that attach once a particular item is deemed "an educational record" within the meaning of the Family Educational Rights and Privacy Act of 1974, Pub. L. No. 93-380, 88 Stat. 571).

bill); Amicus NACDL Br. 10-13 (listing other examples). Respondent "has been unable to demonstrate" any such "history of prosecutorial excess." *Brogan*, 522 U.S. at 405.[6] And he acknowledges (Resp. Br. 5) that his own prosecution is far from absurd. There is no absurd results "overbreadth" doctrine that permits a defendant to seek a judicially created exception from otherwise clear statutory language when his own conviction under the statute is eminently reasonable, see U.S. Br. 32, and neither respondent nor his amicus contends otherwise. Overbreadth is "strong medicine," and therefore the exception, not the rule. It cannot be used to call into question a statutory application that is far from absurd.

At any rate, the concerns expressed by respondent and his amicus about the breadth of the term "explosive" as defined in 18 U.S.C. 844(j) are considerably overstated. Section 844(j) has three parts. The first enumerates seven items: "gunpowders, powders used for blasting, all forms of high explosives, blasting materials, fuzes (other than electric circuit breakers), detonators, and other detonating agents, [and] smokeless powders." 18 U.S.C. 844(j). The second incorporates the definition of "explosive or incendiary device" from 18 U.S.C. 232(5), which includes dynamite, grenades and grenade-like devices, and Molotov cocktails. 18 U.S.C. 844(j). The

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[6] Respondent's contention (Resp. Br. 22) that courts must simply ignore the existence of prosecutorial discretion when construing criminal statutes misses the mark. The decisions he cites—*Keyishian* v. *Board of Regents*, 385 U.S. 589 (1967), and *Baggett* v. *Bullitt*, 377 U.S. 360 (1964)—stand for the far more limited proposition that when a law's very existence threatens to chill conduct protected by the First Amendment, the exercise of prosecutorial discretion *ex post* cannot eliminate the constitutional problem.

third and final portion of Section 844(j) defines "explosive" also to include:

> any chemical compounds, mechanical mixtures, or device that contains any oxidizing and combustible units, or other ingredients, in such proportions, quantities, or packing that ignition by fire, by friction, by concussion, by percussion, or by detonation of the compound, mixture, or device or any part thereof may cause an explosion.

18 U.S.C. 844(j).

Because no "everyday items" (Resp. Br. 9) are specifically enumerated in Section 844(j), the only way such items could constitute an "explosive" for purposes of Section 844(h)(2) is if their particular properties bring them within the final, catchall provision. That fact, in turn, has two principal consequences. First, because respondent does not dispute that the items found hidden in the trunk of his car constituted an "explosive" under any conceivable reading of Section 844(j), this case does not require the Court to determine the outer boundaries of that term, and it is far from clear that many of the examples respondent cites would fall within it in any event.[7] Second, because respondent's jury was instruc-

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[7] Respondent (Resp. Br. 9-10) and his amicus (NACDL Br. 9) cite various lower-court decisions holding that, in certain circumstances, gasoline—and, in one instance, a mixture of methane gas and air—could constitute an "explosive" within the meaning of Section 844(j). But see *United States* v. *Gelb*, 700 F.2d 875, 878–879 (2d Cir.) (holding that Section 844(j) does not encompass "uncontained gasoline"), cert. denied, 464 U.S. 853 (1983). None of these decisions, however, involved a prosecution under Section 844(h)(2); all involved circumstances in which the gas had been used or had been intended to be used to start or spread a destructive fire; and all involved conduct predating Congress's decision to amend a number of provisions, including Section 844(h)(1)

ted that it could not convict unless it found that he "knowingly carried explosive materials" (J.A. 65), the Court need not decide whether a person could be convicted under Section 844(h)(2) of carrying a commonplace and otherwise lawful item during the commission of an unrelated federal felony without proof that the defendant "knew of the features of [the relevant item]

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but excluding Section 844(h)(2), to cover situations involving "fire" as well as "an explosive." Anti-Arson Act of 1982, Pub. L. No. 97-298, § 2, 96 Stat. 1319; see H.R. Rep. No. 678, 97th Cong., 2d Sess. 2 (1982) (noting that "[s]everal courts * * * ha[d] rejected th[e] theory" that "gasoline mixed with air" was an explosive under Section 844(j)). The "fireworks" (Resp. Br. 10; see Amicus NACDL Br. 9) at issue in *United States* v. *Shearer*, 479 F.3d 478 (7th Cir. 2007), were "display fireworks," which "are more dangerous than consumer fireworks because they contain more than 130 milligrams of flash powder per tube, meaning that they are susceptible to mass detonation." *Id.* at 481; see 18 U.S.C. 844(j) ("in such proportions, *quantities*, or packing that ignition * * * may cause an explosion") (emphasis added). The Seventh Circuit has not "assum[ed] without deciding" (Resp. Br. 10) that ammonium nitrate fertilizer, standing alone, constitutes an explosive. The underlying offenses in *United States* v. *Nettles*, 476 F.3d 508 (7th Cir. 2007), involved an attempt to destroy the Dirksen Federal Building using "a time bomb" made from "diesel fuel and ammonium nitrate," *id.* at 511, and the issues on appeal had nothing to do with the statutory definition of "explosive." See *id.* at 512-518. Finally, *United States* v. *Agrillo-Ladlad*, 675 F.2d 905, 906 (7th Cir.), cert. denied, 459 U.S. 829 (1982), does not hold (Amicus NACDL Br. 12-13) that Section 844(j)'s catchall provision encompasses cleaning fluids, commercial solvents, or ammonium nitrate. The issue in *Agrillo-Ladlad* was whether gasoline constituted an explosive under the circumstances of that case, *id.* at 906, and the footnote cited repeatedly by amicus NACDL simply quotes testimony by an Assistant Secretary of the Interior urging rejection of the proposed bill that became Section 844(j), see *id.* at 909 n.5. See also U.S. Br. 31 n.4 (discussing *United States* v. *Davis*, 202 F.3d 212 (4th Cir.), cert. denied, 530 U.S. 1236 (2000) (cited in Resp. Br. 9 & n.2)).

that brought it within the scope of [Section 844(j)]." *Staples* v. *United States*, 511 U.S. 600, 619 (1994).

In the end, respondent's and his amicus' "principal grievance" is "with Congress itself, which has decreed" the carrying of *any* explosive during the commission of *any* federal felony "to be a separate offense, and a serious one." *Brogan*, 522 U.S. at 405. But "[i]t is not" this Court's role "to revise that judgment." *Ibid.* And while respondent repeatedly complains about Section 844(h)(2)'s "harsh and inflexible mandatory minimum sentence" (Resp. Br. 20; see *id.* at 3, 5, 7, 22-23 & n.5), "the instances in which courts may ignore harsh penalties are set forth in the Constitution," *id.* at 407, and, beyond those limits, issues regarding "severity of punishment * * * are peculiarly questions of legislative policy." *Gore* v. *United States*, 357 U.S. 386, 393 (1958). Respondent's conduct clearly satisfies Section 844(h)(2), and the Court need go no further to reverse the Ninth Circuit's judgment.

C. Neither Statutory Purpose Nor Legislative History Warrants A Different Result

Respondent and his amicus make a variety of arguments based on their view of Section 844's overall purpose and their reading of the statutory and legislative history. Because the statutory text is plain and unambiguous, there is no need for any assessments about statutory purpose, nor warrant for examining legislative history. In any event, respondent's arguments on this score lack merit as well.

1. Respondent quotes (Resp. Br. 18) language from a section of the original legislation that enacted Section 844(h)(2) that describes the purpose of the relevant title as "reducing the hazard to persons and property arising

from misuse and unsafe or insecure storage of explosive materials" without "plac[ing] any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to * * * use of explosive materials for * * * lawful purposes." Organized Crime Control Act of 1970, Pub. L. No. 91-452, § 1101, 84 Stat. 952. Respondent (Resp. Br. 20) and his amicus (NACDL Br. 17) also cite language from a committee report stating that "[b]ombings and the threat of bombings have become an ugly, recurrent incident of life * * * throughout our Nation," and describing the relevant title as "strengthen[ing] and expand[ing] criminal prohibitions that apply to the intentional misuse of explosives." H.R. Rep. No. 1549, 91st Cong., 2d Sess. 37-38 (1970) (*1970 House Report*).

Respondent suggests that interpreting Section 844(h)(2) in accord with its plain meaning would not further the statutory purpose, because, he claims, "the coincidental carrying of explosives" during an unrelated felony does not constitute "misuse" (Resp. Br. 18), and because criminalizing such conduct would "interfere with the lawful use of explosives" (*id.* at 20). But invocations of legislative history does not save respondent's flawed "misuse" argument. See pp. 5-6, *supra*. And "it is not and cannot be [this Court's] practice to restrict the unqualified language of a statute to the particular evil that Congress was trying to remedy." *Brogan*, 522 U.S. 403; see also *Oncale* v. *Sundowner Offshore Servs., Inc.*, 523 U.S. 75, 79 (1998) (explaining that "statutory prohibitions often go beyond the principal evil" that motivated the law); *Gonzales* v. *Oregon*, 546 U.S. 243, 288 (2006) (finding "no reason to think" that a statute's "*principal* concern" is its "*exclusive* concern"). What is more, this Court's task "is not the hopeless one of ascer-

taining what the legislators who passed the law would have decided had they reconvened to consider [respondent's] particular case[]." *Beecham* v. *United States*, 511 U.S. 368, 374 (1994). Finally, a person who commits a federal felony—a prerequisite for a Section 844(h)(2) violation—is simply not a "law-abiding citizen" engaged in the sort of "entirely innocent conduct" (Resp. Br. 16) that Congress did not intend to criminalize.[8]

2. Respondent (Resp. Br. 16) and his amicus (NACDL Br. 15-16) also maintain that Section 844(h)(2) should not be read according to its terms because the legislative history of the 1988 amendment that deleted the word "unlawfully" does not speak directly to the precise question here. That inversion of the normal rules of statutory construction is seriously misplaced.

Even if the legislative history specifically addressed the question presented, it could not override the unambiguous statutory text. See, *e.g.*, *Exxon Mobil Corp.* v. *Allapattah Servs., Inc.*, 545 U.S. 546, 567-568 (2005). It follows *a fortiori* that the *absence* of such on-point history cannot do so either. See, *e.g.*, *Whitfield* v. *United States*, 543 U.S. 209, 216 (2005). Indeed, "it would be a strange canon of statutory construction that would require Congress to state in committee reports or elsewhere in its deliberations that which is obvious on the

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[8] Respondent also observes (Resp. Br. 20) that the *1970 House Report* described Section 844's overall purpose as "creat[ing] certain offenses pertaining to the unlawful use of explosives." *1970 House Report* 68 (emphasis omitted). Not only did that broad statement refer only generally to a wide range of offenses, but the original version of Section 844(h)(2) was expressly limited to situations where a defendant "carrie[d] an explosive *unlawfully*." 18 U.S.C. 844(h)(2) (1970) (emphasis added). That limitation is no longer part of the law, which now requires only that the explosive be "carrie[d]" (not used) "during the commission of" a federal felony. 18 U.S.C. 844(h)(2).

face of the statute." *Harrison* v. *PPG Indus., Inc.*, 446 U.S. 578, 592 (1980).

In any event, neither respondent nor his amicus meaningfully refute the point, see U.S. Br. 18-24, that Section 844(h)(2)'s history confirms that the absence of a relational element reflects a deliberate congressional choice. Respondent asserts (Resp. Br. 26) that Congress's failure to add the words "and in relation to" to Section 844(h)(2) "reflects only that there is little to be learned from Congressional inaction." But this case involves far more than "the failure of Congress to act on particular legislation." *Bob Jones Univ.* v. *United States*, 461 U.S. 574, 600 (1983). In the first place, it involves Congress's failure to add four words to the statute to change its meaning. That kind of congressional inaction is always relevant. In addition, it involves a situation where Congress—faced with a published court of appeals decision holding that the pre-amended Section 844(h)(2) did not require proof that the explosive was carried in relation to the underlying felony—chose to amend Section 844(h)(2) *without* at the same time adding the words "and in relation to" that it had added to Section 924(c) just four years earlier. U.S. Br. 20-22.[9]

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[9] Respondent errs in asserting (Resp. Br. 26) that Section 13 of the Omnibus Crime Control Act of 1970, Pub. L. No. 91-644, 84 Stat. 1890 (1970 Amendment), suggests "[t]hat amendments made to [18 U.S.C.] 924(c) but not to Section 844(h)(2) provide little guidance on how to interpret Section 844(h)(2)." The 1970 Amendment substantially modified the penalties under 18 U.S.C 924(c) (Supp. IV 1968), and it also made explicit that which was previously implicit—*i.e.*, that, even under the "carries" provision, the defendant must bear responsibility for the underlying felony. But nothing indicates that, before the 1970 Amendment, Section 924(c) would have applied in situations where the defendant was not responsible for the underlying felony.

D. Neither The Rule Of Lenity Nor The Doctrine Of Constitutional Avoidance Applies

Section 844(h)(2) provides more than "a fair warning * * * to the world in language that the common world will understand * * * what the law intends to do if a certain line is passed." *Arthur Andersen LLP* v. *United States*, 544 U.S. 696, 703 (2005) (internal quotation marks and citation omitted). The words "during the commission of any [federal] felony" are perfectly easy to understand, and they do not mean "during and in relation to." Nor does Section 844(h)(2) "clearly implicate[] conduct that may 'by itself [be] innocuous,'" Resp. Br. 28 (brackets in original) (quoting *Arthur Andersen*, 544 U.S. at 703), because the statute is not even potentially applicable until a person commits another act that Congress has deemed sufficiently culpable to warrant making that act a federal felony.[10] This is simply "not a case of guesswork reaching out for lenity," and "the rule of lenity is no help to respondent[] here." *United States* v. *Wells*, 519 U.S. 482, 499 (1997).

Respondent errs in asserting (Resp. Br. 30) that, given the breadth of the definition of "explosive" in Section 844(j), the absence of a relational element could

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[10] *Castillo* v. *United States*, 530 U.S. 120 (2000) (see Resp. Br. 29) considered the length of the additional mandatory sentence as a factor "weigh[ing] in favor of treating" a statutory requirement that a defendant receive an enhanced sentence if the firearm involved was a "machinegun" "as referring to an element" of a separate crime, because "if after considering traditional interpretive factors, we were left genuinely uncertain as to Congress' intent in this regard, we would assume a preference for traditional jury determination of so important a factual matter." *Id.* at 131. *Castillo* provides no support, however, for reading into Section 844(h)(2) a wholly new factual requirement that Congress has nowhere provided.

render Section 844(h)(2) void for vagueness. Respondent makes no assertion that the statute is even remotely ambiguous about whether the items seized from his car constituted an "explosive," and the general rule is that, outside the First Amendment context, see *United States* v. *Mazurie*, 419 U.S. 544, 550 (1975), "[o]ne to whose conduct a statute clearly applies may not successfully challenge it for vagueness." *Parker* v. *Levy*, 417 U.S. 733, 756 (1974); accord *Village of Hoffman Estates* v. *Flipside, Hoffman Estates, Inc.*, 455 U.S. 489, 495 (1982). And even if the Court were to conclude that Section 844(j)'s definition of explosive might be unconstitutionally vague as applied to circumstances other than the one at issue here, the appropriate way to deal with such concerns would be through a narrowing construction of the third, catchall portion of that definition, or by construing the statute to require that the defendant "knew of the features of [the relevant item] that brought it within the scope of [Section 844(j)]." *Staples*, 511 U.S. at 619; see *Hoffman Estates*, 455 U.S. at 499 (stating that "a scienter requirement may mitigate a law's vagueness, especially with respect to the adequacy of notice * * * that [the defendant's] conduct is prescribed"). But there is no warrant for imposing a relational element that has no basis whatsoever in the statutory text or background principles of statutory interpretation—an element that would in any event do nothing to provide additional notice about the nature of the substances covered by Section 844(h)(2) and the various other provisions that incorporate Section 844(j)'s definition of "explosive."

Respondent contends (Resp. Br. 30) that "[r]easonable people are unlikely to understand that" some of the conduct prescribed by Section 844(h)(2) is unlawful. But

that is a claim about citizens' awareness of the law, not vagueness, and this Court has repeatedly reaffirmed the bedrock principle that, outside narrowly defined circumstances not present here, "ignorance of the law is no excuse." *Bryan* v. *United States*, 524 U.S. 184, 195 (1998); see *Staples*, 511 U.S. at 622 n.3 (citing *Cheek* v. *United States*, 498 U.S. 192, 199 (1991)).

Finally, the canon of constitutional avoidance (Resp. Br. 29-30; Amicus NACDL Br. 14 n.6) has no application here. That "canon is * * * a means of giving effect to congressional intent, not of subverting it," and it is properly invoked only where a court must "choos[e] between two competing plausible interpretations of a statutory text." *Clark* v. *Martinez*, 543 U.S. 371, 380-382 (2005); see *United States* v. *Albertini*, 472 U.S. 675, 680 (1985) (stating that the constitutional avoidance canon "is not a license for the judiciary to rewrite the language enacted by the legislature"). Here, there is only one plausible interpretation of the statutory text. In addition, respondent has failed to identify any "serious constitutional doubts," *Clark*, 543 U.S. at 381, that would be raised by construing Section 844(h)(2) in accordance with its plain terms. Given the inherent danger posed by the items specified in Section 844(j), there is nothing arbitrary or irrational about Congress's decision to create a separate criminal offense applicable to those who commit federal felonies while carrying such items. See *Johnson* v. *Robinson*, 415 U.S. 361, 378 (1974) (stating that a statute survives rational basis review so long as "characteristics peculiar to only one group rationally explain the statute's different treatment of the two groups").

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For the foregoing reasons, and those stated in the government's opening brief, the judgment of the court of appeals should be reversed and the case remanded for further proceedings.

Respectfully submitted.

PAUL D. CLEMENT
Solicitor General

MARCH 2008